Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, *et al.*,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services, where Congress intended to exempt them, and the plain statement rule dictates exemption if the law is ambiguous?

II. Whether the Fair Labor Standards Amendments of 1974 compromise the Tenth Amendment and the Constitution's structural framework of dual sovereignty by (a) directing the functioning of state and local government public safety operations and (b) interfering with the provision of essential local emergency services?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr.; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Ann Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.; Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.;

Dawn Rodriguez; David R. Klinger; William H. Phillips; Bruce E. Fritz; Charles Edward Yetter; R. Thomas Crow II; Debbie Schueler; William A. Cooper, Jr.; Steven K. Frye; Michael C. Huffman; Joseph M. Jordan; David James Geslois; Russell E. Davies, Jr.; Erick A. Esker; Donald Weigel; Ralph David Ritchie; Kenneth S. Banke; Jeannie Squillaci; Harry Joseph Joyave; Michael B. Ladd; William L. Bethea III; John E. Lamb; Daniel T. Woolston; Patrick J. Carmody; Clarence Gerard Hayes; Brett J. Howe; D. Depriest; John G. Alexander; Steven P. Ambrozowicz; Daniel F. Bowen; Claudia L. Clark; Susan E. Egan; Stephen Scott Feilinger; James Edward Harsh; Sarah Lefler; John Duffy McAnallen; Robert O'Brien; Michael F.X. O'Connell, Jr.; Anthony J. Pugliese; Edward Joseph Ross III; Randall W. Corbel; Kenneth T. Claypool; John A. Covington; John N. Dennett; George F. Dickey; Stephanie Sheinbach Dietz; Roland Fink, Jr.; Walter A. Ford, Jr.; Jeffrey L. Orye; Kenneth L. Pardoe; Keith A. Lefler; James L. Kidwell; Thomas A. Pezza; Noldon Pope; David A. Badwak; Douglas Bosley; Thomas R. Butler, Jr.; and Michael P. Henry. The United States of America is an Intervenor.

CORPORATE DISCLOSURE

Anne Arundel County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Anne Arundel County, Maryland, and as such has no corporate parents or subsidiaries.

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Anne Arundel County, Maryland ("County"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab. Cas. P33,647, 4 Wage and Hour Cas. 2d (BNA) 641 (Feb. 18, 1998) (No. 96-1280, 96-1251). (App. 75a.) The opinions of the district court are unreported. (App. 1a and 18a.)

JURISDICTION

The court of appeals entered its judgment by opinion dated February 18, 1998 (App. 75a), and denied the County's Petition for Rehearing and Suggestion for Rehearing *En Banc* on May 13, 1998. (App. 100a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

29 U.S.C. §207(a)(1) (1994) provides:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(k) (1994) provides:

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT OF THE CASE

A. The County And Its Fire Department

Anne Arundel County is a political subdivision of the State of Maryland, exercising powers of local government and home rule. *See* Md. Const. art. XI-A; Md. Ann. Code Art. 25A (1998); Anne Arundel County, Md., Charter, pmbl. and §101 (App. 111a). The County's Charter establishes the framework of its government, and requires the provision of typical local government services to citizens within its borders. At issue in this case is the operation of the County's Fire Department,[1] which provides fire suppression, fire prevention, fire training, fire communications, and emergency medical services. Anne Arundel County, Md., Charter, §547 (App. 111a).

As with most modern fire departments, the County Fire Department responds to a myriad of emergencies, including fires, accidents of all types, medical emergencies, hazardous materials situations and natural disasters, and its functions are necessarily dependent on the nature of the emergencies that arise. The majority of Fire Department responses, however, are related to the provision of emergency medical services. In order to provide efficient emergency response across the 416 square miles within the County's borders, the Department cross-trains all of its firefighters to perform rescue and emergency medical services.

The Department's operational structure is broken down into several "bureaus," including the Operations Bureau, comprising a suppression division and an emergency medical services division. Firefighters from both

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[1] The County funds the Fire Department with taxpayer dollars, and no fees are charged for emergency services.

divisions of the Bureau work on a "tour of duty"[2] basis, assigned in various combinations to 30 fire stations geographically located throughout the County, where they sleep, eat, handle miscellaneous fire station chores, and wait to be called to emergencies. All firefighters work the same shift schedules, co-respond to most types of emergency calls,[3] and are integrated into the same command structure.[4] The Fire Department's operational structure, and its ability to respond to whatever emergency situation occurs, is dependent on its use of cross-trained and interchangeable personnel.

B. The FLSA And The §207(k) Exemption

The Fair Labor Standards Act ("FLSA"), as originally enacted in 1938, was a depression-era measure intended to alleviate "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Fair Labor Standards Act of 1938, ch. 676, §2, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §202). To accomplish this purpose, the 1938 Act, which applied

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[2] 29 C.F.R. §553.220 defines the term "tour of duty."

[3] EMS division personnel are automatically dispatched to all fires in the County except very small incidents, and they are also dispatched to all accidents, hazardous materials spills and rescues.

[4] The terms and conditions of firefighters' employment, including wages, hours and salaries, are negotiated and governed by union contract. In 1990, when this suit was filed, they worked 16-day cycles of 24 hours on duty, followed by 48 hours off duty, and worked an average of 52 hours per week, which included sleep and meal time. Currently, firefighters work an average of 48 hours per week.

only to private industry, ch. 676 §3(d), 52 Stat. 1060, provided for a mandatory minimum wage, and required employers to pay overtime after a specified number of hours at the rate of one-and-one-half times the employee's regular rate of pay.

Through the course of numerous amendments over the ensuing years, Congress gradually expanded the scope and complexity of the Act. In 1974, through legislation primarily directed at raising the minimum wage, Congress extended the Act's mandates to employees of state and local governments. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6(a)(1), 88 Stat. 55, 59 (1974) (codified at 29 U.S.C. §203(e)(2)(C)). Congress recognized, however, that the forty-hour workweek was intended for industrial and agricultural employees, and that public safety employees necessarily work on a "tour of duty" basis, which includes substantial time waiting to be called to an emergency. *See* H.R. Conf. Rep. No. 93-953, at 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2864. Because of the unique hours and long waiting periods required in public safety work, *see Schmidt v. County of Prince William, Va.*, 929 F.2d 986, 990 (4th Cir. 1991), Congress enacted a partial exemption from the overtime requirements for employees of public law enforcement and fire protection agencies. §6(c)(1), 88 Stat. at 61 (codified at 29 U.S.C. §207(k)).[5]

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[5]Section 207(k) was created as a compromise between Senate Bill 2747, which contained only a limited phase-in of the FLSA's general overtime provisions for police and fire, and House Bill 12435, which contained a complete overtime exemption. H.R. Conf. Rep. No. 93-953, *supra*. The compromise resulted in the creation of a partial exemption, by raising the maximum hours standard (currently 212 hours in a 28-day "work period," 29 C.F.R. §553.230), and tying it to the flexible "tour of duty," rather than a mandatory seven-day workweek. *See id.*

Committee reports suggest that, in applying the FLSA to state and local governments, Congress acted on the belief that the law would have little effect on States and their local governments, provided an "overtime exemption [was] contained in the bill for police and firemen." H.R. Conf. Rep. No. 93-913, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2838. In its report, the House Committee on Education and Labor cited a nationwide survey conducted by the United States Department of Labor ("DOL"), finding that "wage levels for state and local government employees not covered by the FLSA are, on the average, substantially higher than those of workers already covered," and that state and local government employees seldom work more than forty hours per week, except those employees "in the public safety activity, which includes police and fire departments." *Id.* at 28, 29. Based on the DOL survey, and noting that the original bill contained a complete overtime exemption for "police and firemen," the House Committee reported that "the actual impact on state and local governments then, of a 40-hour standard, will be virtually non-existent." *Id.* at 29.

The House's view of the "non-existent" impact of the Amendments was not immediately tested; in 1976, this Court decided *National League of Cities v. Usery,* 426 U.S. 833, holding that the Amendments exceeded the powers granted to Congress under the commerce clause because they directly displaced the States' freedom to structure integral operations in areas of traditional governmental functions. Nine years later, however, in *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985), the Court abruptly reversed *National League,* concluding that the "traditional governmental functions"

test was "unworkable" and "inconsistent with established principles of federalism." *Garcia*, 469 U.S. at 531. Although the *Garcia* majority conceded that "the States unquestionably do 'retai[n] a significant measure of sovereign authority,' " quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting), it rationalized that the States could rely on the national political process to protect their constitutionally-mandated role in the federal system.[6] *Garcia*, 469 U.S. at 549. Four members of the *Garcia* Court strongly dissented, maintaining that the majority decision was violative of state sovereignty and inconsistent with the fundamental principles of our constitutional system. *Id.* at 557-89.

To alleviate the sudden turmoil created by *Garcia's* reversal of *National League*, Congress enacted the Fair Labor Standards Amendments of 1985, deferring temporarily the application of the FLSA overtime provisions, "so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities." S. Rep. No. 99-159, at 8, 15 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655-56, 663.

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[6]Ironically, in touting the solicitude of Congress and the effectiveness of the "political process" to protect the interests of the States, *Garcia* pointed to the "special provisions concerning overtime pay for law enforcement and firefighting personnel [enacted by Congress] when it amended the FLSA in 1974 in order to take account of the special concerns of States and their localities with respect to these positions." *Garcia*, 469 U.S. at 554 n.17.

C. The Proceedings Below

Respondents John D. West and seventy-four other County firefighters[7] filed suit against the County in August 1990, alleging violations of the FLSA, 29 U.S.C. §§201-219 (1994), pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1337(a) (1994). Respondents claimed that the County violated the FLSA by compensating them for overtime hours in accordance with the law's partial exemption for fire protection and law enforcement employees under 29 U.S.C. §207(k) ("§7(k)"). Respondents argued that, because the bulk of their work relates to emergency medical response,[8] they are not covered by the §7(k) exemption, and that the County was therefore required to pay them as it paid its office and administrative employees, under the forty-hour maximum workweek standard of 29 U.S.C. §207(a).

The district court resolved this case on summary judgment motions. In June 1992, the court granted a partial summary judgment to Respondents, agreeing with their contention that the §7(k) exemption should be construed narrowly, and does not apply to emergency medical functions. (App. 1a.) Although the court acknowledged that Respondents met the four-part test defining fire protection employees set forth in DOL regulation 29 C.F.R. §553.210 (1997)[9] (App. 13a-15a), the court nonetheless

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[7] During the five years between the filing of suit and the Court's entry of judgment, 67 additional firefighters joined the action as plaintiffs, pursuant to 29 U.S.C. §216 (1994), for a total of 142 plaintiffs.

[8] Each Respondent had been assigned, at some time between 1987 and 1995, to the emergency medical services division of the Operations Bureau.

[9] 29 C.F.R. §553.210(a) defines "any employee . . . in fire protection activities" as an employee

[footnote continued]

found the §7(k) exemption inapplicable, based upon a narrow construction of the exemption, and a broad construction of the words "nonexempt work" as used in 29 C.F.R. §553.212 (1997).[10] In brief, the court determined that emergency medical response was "nonexempt work" under §553.212, and that Respondents, by virtue of their emergency medical functions, performed in excess of the twenty percent limit on nonexempt work. The court refused to consider whether Respondents fit within the "integral part" language set forth in §553.210, deciding that the language was essentially surplusage. (App. 11a-12a.)

> (1) employed by an organized fire department . . . (2) who has been trained to the extent required by [law] . . . (3) who has the legal authority and responsiblity to engage in the prevention, control or extinguishment of a fire . . . and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance [etc.] . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

Section 553.215(a) provides that "ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated" as exempt if they have received rescue training and if they are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. (Both regulations are set out in full at App. 106a and 109a.)

[10] 29 C.F.R. §553.212(a) provides that "employees engaged in fire protection or law enforcement activities as described in §§553.210 . . . may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities," provided the "nonexempt work" does not exceed "20 percent of the total hours worked by that employee during the workweek or applicable work period." Section 553.212, which cites tree-planting by firefighters as an example of "nonexempt work," is set out in full at App. 108a.

In August 1995, the court issued summary judgment on the remaining issues in the case.[11] (App. 18a.) It issued its final judgment on January 18, 1996, awarding damages against the County in the amount of $2,907,-203.63, plus post-judgment interest. (App. 58a.)

Both parties appealed.[12] The court of appeals heard oral argument in July 1997, during which the panel posed questions to the parties regarding the ramifications of the recent decision of this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997). The court subsequently ordered the parties to brief and argue the issue of the constitutionality of the FLSA as applied to this case, in light of *Printz* (App. 80a), and the United States then intervened. After hearing argument in December 1997, the court issued an opinion on February 18, 1998, affirming the district court's rejection of the FLSA's §7(k) exemption, and affirming the denial of liquidated damages, but reversing as to the applicability of the 29 U.S.C. §213(a) executive and administrative exemption for captains and lieutenants. (App. 75a.)

The court of appeals rejected the County's argument that *Garcia* was not controlling on the "critical" issue of the constitutionality of the FLSA as applied to the facts of this case, explaining that:

> we conclude both that *Garcia* controls the disposition of that issue and that any decision to revisit

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[11] On this Summary Judgment, the court again found in favor of Respondents, deciding that those Respondents who were lieutenants or captains did not qualify under the 29 U.S.C. §213-(a)(1) overtime exemptions for administrative and executive employees.

[12] Respondents appealed the imposition of a two-year, rather than a three-year, limitations period, and the court's denial of liquidated damages.

> *Garcia* is not ours to make . . . The Supreme Court's decision has been crystal clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." [citation omitted] That apparently is the situation here: *Garcia* is specifically on point; *Printz*'s contrary intimations are only generally instructive. We thus conclude on the authority of *Garcia* that the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect.

West, 137 F.3d at 760. (App. 88a.)

The County filed a Petition for Rehearing and Suggestion for Rehearing *En Banc,* which was denied by the court of appeals on May 13, 1998 (App. 100a), and a Motion to Stay Issuance of the Mandate, which was denied by Order dated May 20, 1998. The County then filed an Application to Stay Enforcement and Execution of Judgment with this Court, which was granted by Chief Justice Rehnquist on June 9, 1998.

REASONS FOR GRANTING THE PETITION

This case involves the operation of a local government fire department and its ability to continue to provide emergency services under the strictures of the 1974 Amendments, as interpreted by the lower courts. It is a matter of critical importance to public safety services nationwide, as the majority of all fire department responses in the United States are related to the provision of emergency medical services. *See* M. Campbell, *et al., The National Run Survey 1997,* Firehouse, June 1998,

at 86, 92-96. If emergency medical response is considered "nonexempt" work, then most firefighters, and virtually all rescue and ambulance employees, will be excluded from coverage and subject to the Act's forty-hour maximum hours provision.[13]

No function is better suited to local oversight and control, and no function is more critical for the preservation of state and local governments, than the protection of lives and property. In this case, the lower courts interpreted the FLSA so as to remove that control, and to substitute differing maximum hours standards for emergency functions performed by firefighters, without regard for the impact of those mandates on local operations, or the needs of particular localities and their citizens. Moreover, the exemption at issue here has been repeatedly characterized as "ambiguous" by the courts, yet it is narrowly construed, resulting in a deprivation of local government autonomy that Congress very likely did not intend, and a result at odds with the plain statement rule applied in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[14]

The ambiguity of the §7(k) exemption is evident in the conflicting decisions of the lower courts, which have created uncertainty and confusion in the operation of public emergency services, and imposed enormous mone-

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[13] Under the traditional 24-hour "tour of duty" shift, just two shifts per week substantially exceeds the 40 hour limit.

[14] The plain statement rule outlined in *Gregory* provides that "the Court will not interpret a federal statute in a manner that would interfere with essential state or local government functions unless Congress plainly states its intention to do so in the statute itself." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, §4.10(d) at 449 (2d ed. 1992).

tary liability upon state and local governments. While most courts acknowledge that public emergency medical service may be exempt work, the circuits are deeply divided over what test or tests should be used to determine exemption, how to determine which particular activities are exempt and which are nonexempt, and when 29 C.F.R. §553.212 ("80/20 rule") applies to deny the exemption.

This case presents an opportunity for the Court to clarify the confusion over §7(k) and its application to public safety emergency services. It also presents an opportunity for the Court to reexamine *Garcia*, which, as recognized by the Fourth Circuit below, "appears to rest on reasons rejected" in other opinions of this Court. (App. 88a.)

While the actual holding of *Garcia* was limited to determining that the FLSA could constitutionally be applied to a local government mass-transit system, *Garcia*'s theory that the "effectiveness of the federal political process" serves to "[ensure] that laws that unduly burden the States will not be promulgated," *Garcia*, 469 U.S. at 552, 556, has been widely adopted by the lower courts to foreclose any constitutional challenge to the FLSA, regardless of the State interests affected. *See, e.g., West*, 137 F.3d at 760 (App. 88a); *Reich v. New York*, 3 F.3d 581, 589 (2d Cir. 1993); *International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 820-21 (10th Cir. 1989).

The Court's post-*Garcia* opinions, however, demonstrate that federalism is not an antiquated maxim to be preserved only by the grace of Congress; rather, it is the underlying structure on which our constitutional system of government functions. These opinions indicate that the Court will not simply "[wash] its hands of all efforts

to protect the States," *Garcia,* 469 U.S. at 587 (O'Connor, J., dissenting), but will assume its responsibility "to say what the law is," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), when faced with Congressional action that compromises the structural framework of dual sovereignty.

For these compelling reasons, as more fully explained below, the Court should grant this Petition.

I.
THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND HEIGHTENS THE CONFUSION SURROUNDING THE §7(k) EXEMPTION.

The hallmark of the many lower court opinions interpreting the §7(k) exemption is the inconsistency in their reasoning and results, and the decision of the Fourth Circuit in this case serves only to fuel the disarray. Not only did the court fail to address the conflicts in the prior §7(k) decisions, it cited no case law in support of its determination of the issue. (App. 88a-91a.)

In their ongoing struggle to divine the meaning of the exemption, courts have looked to the DOL's regulations for guidance, resulting in a variety of suggested "tests" for exemption. The district court in the instant case, and in its companion opinion in *Nalley v. Mayor of Baltimore,* 796 F. Supp. 194, 198 (D. Md. 1992), concluded that the "integral part" language of 29 C.F.R. §553.210 had no independent meaning, and simply referred back to the four-part test stated earlier in the same regulation. The court further found that, despite §553.210(a)'s cryptic direction to "see 553.215," the latter regulation could not apply because its application

was specifically limited to employees of a public agency "other than a fire protection" agency.[15]

Taking the contrary approach, the Sixth and Seventh Circuits have decided that the "integral part" test must necessarily be interpreted by reference to §553.215's "substantially related test." *Alex v. City of Chicago*, 29 F.3d 1235, 1241 (7th Cir. 1994) (stating that "the regulations only state one test [§553.215] for the Sec. 7(k) exempt status of publicly employed emergency medical personnel"); *Justice v. Davidson County, Tenn.*, 4 F.3d 1387, 1395 (6th Cir. 1993) (applying §553.215 to define the integral part language of §553.210, but acknowledging that "the courts have not reached a single answer to this question").

The Eleventh Circuit came up with a completely different interpretation, deciding that the "integral part" test must be separate from the "substantially related" test. The court decided to "leave it to the district court" on remand, however, to define the distinction. *See Wouters v. Martin County, Fla.*, 9 F.3d 924, 931-32 (11th Cir. 1993).

It is unclear whether the Fourth Circuit applied any test in its opinion below, because it largely avoided the issue by relying on the 80/20 rule (20 C.F.R. §553.-212). In one sentence, the court tersely concluded that Respondents did not meet the integral part test. (App. 89a.) It then found that "medical services which are not rendered at the scene of any fire do not qualify as exempt activities," and, that, because Respondents spend more than twenty percent of their time on emergency

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[15]This reasoning results in a stricter test for exemption of fire department emergency medical responders than emergency medical responders employed by other public agencies.

medical response, they are not included within the exemption. (App. 90a-91a.)

The court's use of the 80/20 rule to deny the exemption, however, conflicts with the decision of the Eighth Circuit in *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S. Ct. 5576 (1997), as well as the decision of the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), which found emergency medical response to be exempt work. In *Christian*, the Eighth Circuit held that time spent by the plaintiff paramedics on "providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their jobs," and thus was not "nonexempt" work within the meaning of §553.212. *Christian*, 108 F.3d 934 (citing *Schmidt*, 929 F.2d at 990), and *Bond*, 939 F.2d 285.[16] The Fourth Circuit's decision in the case at bar also conflicts with *Bond*, where the Fifth Circuit found that the plaintiffs, who were single-role fire department emergency medical service employees, were covered by the §7(k) exemption, although they were not cross-trained as firefighters and performed no firefighting work.

Thus, firefighters who are cross-trained emergency medical services workers qualify for the exemption in the Eighth Circuit, and are not disqualified based on percentage of time spent rendering emergency medical service,

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[16]The lower court in *Christian* had determined that the plaintiff paramedics did not have the legal duty and responsibility to fight fires and did not perform activities concerned with fire suppression, and were therefore not employees in fire protection activities under §7(k) and 29 C.F.R. §553.210. *See* 108 F.3d at 932.

and single-role emergency medical service providers qualify for the exemption in the Fifth Circuit, even though they do not fight fires and are not trained or sworn as firefighters.

The Fourth Circuit's decision to withhold the exemption as to those public safety employees who meet the four-part test of 29 C.F.R. §553.210, but do not spend eighty percent of their time at fire scenes, is at odds with the exemption's intent and the realities of emergency response service. Conversely, the decisions of the Fifth and Eighth Circuits implement Congress's intent to exclude from the general overtime standard firefighters who perform emergency medical service work, and permit overtime to be paid on the "tour of duty" standard that is necessary for the performance of emergency services. This Court should grant certiorari in this case, to clarify the applicability of the §7(k) exemption to these important public safety services.

II.

CONGRESS INTENDED TO INCLUDE LOCAL GOVERNMENT FIREFIGHTERS WHO PERFORM EMERGENCY MEDICAL FUNCTIONS WITHIN THE FLSA'S §7(k) EXEMPTION, AND, IF THE EXEMPTION IS DEEMED TO BE AMBIGUOUS, THE PLAIN STATEMENT RULE COMPELS EXEMPTION.

In *Garcia*, there was no question that Congress intended to apply the FLSA to the mass transit operation at issue, and no contention that transit employees were included within any exemption to the Act. This case presents a different question, however, because it involves an interpretation of an exemption to the FLSA, by which Congress intended to exclude public safety employees such as the respondents in this case. *See Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998).

Further, even if the Court believes Congress's intent is ambiguous, the plain statement rule set forth in *Gregory* compels application of the exemption.[17]

The legislative history culminating in the enactment of §7(k) demonstrates Congress's intent to exclude public ambulance and rescue employees from the general forty-hour overtime standard. In the reports of the legislative committees that reviewed the proposed 1974 Amendments, and the statements of the legislative leaders who were part of the joint House-Senate Conference Committee that developed the §7(k) "tour of duty" concept, the exemption was referenced interchangeably as applying to "policemen and firemen," employees in "firefighting or law enforcement activities" and to "public safety employees." H.R. Rep. No. 93-913, *supra*, at 11, 27, 29; H.R. Conf. Rep. No. 93-953, *supra*, at 26, 27; 120 Cong. Rec. 7310, 7317, 8598, 8599 (1974).

From the floor of the House, legislative leaders recognized the exemption's "tremendous importance" to local governments and the "phenomenal increase" in costs that would be imposed on local governments and their taxpayers without it, and gave explanations and assurances that public agency employees engaged in "rescue-ambulance services"[18] would be covered by the exemption. 120

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[17] In *Gregory*, this Court found that the Age Discrimination in Employment Act ("ADEA"), despite its broad definition of the word "employee," did not apply to state judges, reasoning that "[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are included . . . it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467.

[18] While emergency medical response has long been a component of the fire service, terms such as "paramedic" were not in common use at the time the 1974 Amendments were considered and enacted. *See* Nancy L. Caroline, *Emergency Care in the Streets*,

[footnote continued]

Cong. Rec. at 7317, 7318; 120 Cong. Rec. at 8598. Based on the legislative history, most courts have concluded that ambulance and rescue service personnel could fall within the scope of the terms used in §7(k). *Christian*, 108 F.3d at 934 (citing *Alex*, 29 F.3d at 1239; *Justice*, 4 F.3d at 1392-93; *O'Neal v. Barrow County Bd. of Comm'rs*, 980 F.2d 674, 677 (11th Cir. 1993); and *Bond*, 939 F.2d at 288).

Notwithstanding the evidence of Congress's intent, however, many courts have refused to apply the exemption, citing its ambiguity, and applying hornbook rules of statutory construction. *See Alex*, 29 F.3d at 1239; *Justice*, 4 F.3d at 1392-93; *Horan v. King County Div. of Emergency Med. Services*, 740 F. Supp. 1471, 1476-77 (W.D. Wash. 1990). For example, the Fourth Circuit recently said:

> [t]he Supreme Court has directed that the [FLSA] must be construed "liberally to apply to the furthest reaches consistent with congressional direction." *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296 (1985). For this reason, all "[e]xemptions from or exceptions to the Act's requirements," including the §7(k) exemption, "are to be *narrowly construed against the employer asserting them.*"

Roy v. County of Lexington, 141 F.3d 533, 540 (4th Cir. 1998) (quoting *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1267 (4th Cir. 1996), quoting *Johnson v. City of Columbia*, 949 F.2d 127, 129-30 (4th Cir. 1991)) (emphasis added in *Roy*); *see also* App. 4a.

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at 5 (4th ed. 1991) (stating that the U.S. Department of Transportation issued the first set of national standards and guidelines for paramedic training in 1976).

This mode of construction, which was adopted when the FLSA applied only to private employers, *see, e.g., Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), has been parroted repeatedly, without regard for the different considerations involved when principles of federalism are implicated. In cases involving application of FLSA exemptions to state and local government operations, it reverses the proper inquiry; by construing the FLSA expansively and the §7(k) exemption narrowly, courts ignore *Gregory* and effectively eliminate the exemption that Congress intended.

Where Congress desires to interfere with traditional and essential state functions, such as decisions regarding the hours, wages and functions of local public safety employees, and thus alter the "usual constitutional balance between the States and the Federal Government" it is crucial that it make its intention "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-61 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) and citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)). Therefore, if the §7(k) exemption is ambiguous, it should be interpreted to include Respondents in this case, so as to preserve, rather than destroy, the County's power to operate its fire department. *See Yeskey*, 118 S. Ct. at 1953-54, *citing Gregory*, 501 U.S. at 460-61.

Under the rationale of *Garcia*, state sovereignty must rely on the federal political process, which "ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 556. The political process cannot fulfill that role, however, if vital aspects of local government operations are ceded to the federal government based on ambiguous legislation.

III.

THE FAIR LABOR STANDARDS AMENDMENTS OF 1974 ARE UNCONSTITUTIONAL AS APPLIED IN THIS CASE, AND *GARCIA*'S "POLITICAL PROCESS" RATIONALE DOES NOT FORECLOSE CONSTITUTIONAL CHALLENGE.

Every American schoolchild learns that the Framers of our Constitution divided governmental powers between the national government and the individual States, creating a system of dual sovereignty. *Gregory*, 501 U.S. at 457 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). This division of power was intended not as a housekeeping measure, but as a means to diffuse government authority and thus secure liberty to the people of the United States:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961). *See also Clinton v. New York*, 118 S. Ct. 2091, 2108-10 (1998) (Kennedy, J., concurring); *Printz*, 117 S. Ct. at 2378 (stating that separation of powers "is one of the Constitution's structural protections of liberty"); *New York v. United States*, 505 U.S. 144, 182 (1992) (citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991), and *Gregory*, 501 U.S. at 458).

The Constitution delegates specific powers to the federal government, and leaves all remaining powers to the States, preserving the States' "residuary and inviolable sovereignty" in those areas that were traditionally of local concern and better suited to resolution locally. *The Federalist* No. 39, at 245 (J. Madison) (C. Rossiter ed.

1961); *see* U.S. Const., art. I §8; U.S. Const., art. IV §4; U.S. Const. Amend. X. Although this reliance on the principle of dual sovereignty was "the unique contribution of the Framers to political science and political theory," the judiciary's role in interpreting and enforcing constitutional federalism remains uncertain. *United States v. Lopez*, 514 U.S. 549, 576 (1995). As Justice Kennedy noted in his concurring opinion:

> [o] f the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers.

Lopez, 514 U.S. at 575.

In recent years, this Court has taken steps toward resolving that uncertainty, issuing opinions that are at odds with *Garcia*'s "political process" theory. *See Printz*, 117 S. Ct. 2365 (finding interim provisions of the Brady Handgun Violence Prevention Act unconstitutional as violative of the principle of dual sovereignty); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Article I of the Constitution did not empower Congress to abrogate the States' Eleventh Amendment immunity); *Lopez*, 514 U.S. 549 (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's commerce clause authority); *New York*, 505 U.S. 144 (striking down as violative of the Tenth Amendment legislation compelling states to enact and enforce a federal regulatory program); and *Gregory*, 501 U.S. 452 (upholding state's requirement for mandatory retirement of judges against ADEA challenge, based on interpretation of ambiguous exemption).

In these cases, the Court has not relied upon *Garcia*'s *ipso facto* mechanism for determining whether a congressional enactment violates constitutional federalism. Rather, the Court has indicated that it will invalidate actions that "compromise the structural framework of dual sovereignty," whether caused by a law whose object is to "direct the functioning" of state governments, or a law of "general applicability" that, by "incidental application," excessively interferes with the functioning of States.[19] *See Printz*, 117 S. Ct. at 2383.

It is without question that the 1974 Amendments to the FLSA were enacted with the intent of directing the manner in which state and local governments perform certain fundamental functions. The Amendments displace state and local policies regarding the structure of government operations and the manner in which services are rendered, and displace state and local government control over the terms and conditions of employment of their employees. Further, Congress did more than simply apply the general provisions of the FLSA to state and local governments; it also included specific directives that expressly apply only to state and local governments. Under §7(k) and the implementing regulations, Congress has mandated the maximum hours for employees performing public safety functions, imposed different maximum hours standards depending on the type of emergency service rendered, and determined that an employee

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[19] As the Court noted in *Printz*, the law does not make a distinction between states and their political subdivisions for purposes of determining whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment; "the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity." *Printz*, 117 S. Ct. at 2382.

no longer falls within the exemption if he spends more than a specified percentage of time on functions deemed "nonexempt." 29 C.F.R. §§553.200-553.233 (1997).

The FLSA also directs the States as to which persons they may permit to perform volunteer functions, 29 U.S.C. §203(e)(4)(A); 29 C.F.R. §§ 553.100-553.106, and which persons it may permit to work secondary employment. 29 U.S.C. §207(p); 29 C.F.R. §553.30. It dictates the circumstances under which a state may pay its employees compensatory time, the amount of hours of compensatory time that an employee may accrue, the rate at which compensatory time must be paid, and the amount that an employee shall be paid for accrued compensatory time upon termination of his employment. 29 U.S.C. §207(o); 29 C.F.R. §§553.20-553.28.[20]

Garcia brushed aside the Amendments' degree of interference with state sovereign functions, remarking that the interference was the same as that borne by private industry. The mandates at issue in the instant case, however, cannot be considered laws of general applicability that apply in the same manner to private industry; they are targeted directly at state and local public safety agencies and their specific functions. Moreover, the Constitution's structure is not premised on a division of power between private industry and the federal government, nor does it give private industry a sovereign role in the governing structure of this nation:

> As far as the Constitution is concerned, a State should not be equated with any private litigant. Instead, the autonomy of a State is an essential

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[20]The Act enforces compliance with a heavy hand, imposing criminal penalties of fines and imprisonment, in addition to civil damages, including liquidated damages and attorneys' fees. 29 U.S.C. §216.

> component of federalism. If state autonomy is ignored in asserting the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power 'may well be neglible.'

Garcia, 469 U.S. at 588 (O'Connor, J., dissenting) (citation omitted) (quoting the *Garcia* majority opinion); cf. *Richardson v. McKnight,* 117 S. Ct. 2100 (1997) (explaining that different considerations applicable to government operations justify denial of 42 U.S.C. §1983 immunity to private prison guards).

Even if the Amendments were not so specifically directed to the States, they are invalid as applied to the County here because they excessively interfere with the structure of the County's Fire Department and its performance of critical public safety functions. *See Printz,* 117 S. Ct. at 2383. At the inception of County Charter government, the citizens of Anne Arundel County charged their Fire Department with the responsibility to provide emergency services, and the Fire Department has long carried out that mission through its cross-trained and dual-function firefighters, who work together on the same shift schedules, from the same fire houses that are spread throughout the County. The application of the FLSA, as interpreted by the lower courts in this case, will fundamentally alter the operational structure of the Fire Department and impair the County's ability to provide these essential services to its citizens.

Under our Constitutional scheme, the provision of public safety emergency services to citizens within the borders of the County should remain subject to local control:

> In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." Not only are these activities remote from any normal concept of interstate commerce, they are also activites that epitomize the concerns of local, democratic self-government. . . . In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaulate, and in a democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them.

Garcia, 469 U.S. at 575-76 (quoting *National League*, 425 U.S. at 851) (Justice Powell, with whom Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined, dissenting) (citations omitted).

The dissenting Justices in *Garcia* eloquently set forth their belief that "this Court will in time again assume its constitutional responsibility" to interpret and apply the structural protections of federalism. *Id.* at 589. Federalism and dual sovereignty have little meaning if the States are not permitted to decide the manner in which they will perform functions so decisively within their realm as local public safety emergency services. This case presents an opportunity for the Court to ensure that "the preservation of the States, and the maintenance of their governments [remain] as much within the design and

care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

CONCLUSION

For the foregoing reasons, the County respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, *et al.*,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, etc., et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

ORDER

In accordance with the Opinion filed today in the above-captioned case, IT IS, this 22nd day of June, 1992, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiffs' Motion for Partial Summary Judgment (Paper 127) BE, and the same hereby IS, GRANTED;

(2) That defendant Anne Arundel County's Motion for Summary Judgment (Paper 126) BE, and the same hereby IS, DENIED; and

(3) That the Clerk shall mail a copy of this Order and the accompanying Opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, etc., et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

Filed: June 22, 1992

Francis J. Collins, Esq. and Andrew H. Kahn, Esq. of Baltimore, Maryland, for plaintiffs.

Catherine Durkan, Esq. of Annapolis, Maryland, for defendant.

BLACK, U.S. DISTRICT JUDGE.

Presently pending before the Court are plaintiffs' Motion for Partial Summary Judgment (Paper 127) and defendant Anne Arundel County's Motion for Summary Judgment (Paper 126). These motions present the following issue: at what point must Anne Arundel County pay overtime compensation in a workweek to employees of the fire department's division of Emergency Medical Services (hereinafter "EMS personnel") – after 40 hours or 53 hours? This issue is apparently one of first impression for a court in the Fourth Circuit.

I

The litigants in this action are locked into a contest over the proper construction of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq* ("FLSA"). In particular,

the parties focus on the Act's overtime compensation provisions. Section 207(a) generally requires all employers to compensate their employees at one and one-half times their regular rate for all hours worked in excess of 40 in any given workweek.[1] This section applies to most state and local government employers.

Recognizing the special needs of government and the unusually long hours of some public safety employees, Congress made certain categories of employee exempt from the 40-hour overtime privilege. With special relevance to this suit, Congress specifically exempted employees in fire protection and law enforcement activities. That exemption, set forth in section 207(k), provides as follows:

> (k) Employment by public agency engaged in fire protection or law enforcement activities
>
> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of *any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions)* if –
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as

---

[1] Section 207(a) provides in pertinent part:

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

> determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(emphasis added). As construed by the Department of Labor ("DOL"), an employee involved in fire protection must work a minimum of 53 hours in a week to earn overtime pay, and an employee in law enforcement must work a minimum of 43 hours. 29 C.F.R. §553.230.

Because of the humanitarian intent behind §207(a), the courts have narrowly construed exemptions like §207(k). *Johnson v. City of Columbia,* 949 F.2d 127, 129-30 (4th Cir. 1991); *Donovan v. Brown Equipment & Service Tools, Inc.,* 666 F.2d 148, 153 (5th Cir. 1982). Indeed, exemptions "ought to be applied only in those circumstances which plainly and unmistakably come within their terms and spirit." *Donovan v. Bereuter's, Inc.,* 704 F.2d 1034, 1036 (8th Cir. 1983). Thus, the burden is on defendant to show that it is entitled to exempt a certain classification of employee. *Johnson,* 949 F.2d at 130. *Carlson v. City of Minneapolis,* 925 F.2d 264, 265 (8th Cir. 1991).

II

Anne Arundel County triggered this action by classifying over 100 EMS personnel as exempt because they are employed by the fire department and their work relates to the department's fire protection activities. The County does not assert here that plaintiffs fall within the law enforcement provisions of the statute. Instead, the County exclusively focuses on "fire protection activities" as defined by regulations promulgated by the DOL.

The County asserts that the Court can resolve this issue solely on the basis of 29 C.F.R. §553.210 which states:

> Fire protection activities
>
> (a) As used in [section 207(k) . . . of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . *The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.*
>
> . . . .
>
> (c) Not included in the term "employee in fire protection activities" are the so-called "civilian"

> employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

(emphasis added). In construing this section, the County contends that the four enumerated factors of subsection (a) do not apply to EMS personnel. Instead, the County bases its case on the highlighted sentence, with its "integral part" language.

To clarify this term, the County focuses not on plaintiffs' participation in "fire protection activities" but on their close association with the fire department. The County does not define "integral part" by reference to §553.215, a section which is cross-referenced, since it relates on its face to ambulance and rescue service employees who are not employed by a fire department.[2] At most, the County asserts, this notation simply points to a related but irrelevant section of the regulations. Thus, the County's interpretation of §553.210(a) focuses

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[2]C.F.R. §553.215 provides:

> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by [section 207(k) of the Act] . . . if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

on the plaintiffs' integration into the structure and activities of the fire department.

Pursuant to this construction, the County contends that plaintiffs are similar to firefighters because they share the same employer, the fire department. In addition, the County notes that plaintiffs are integrated into the department by a unified command structure, fire academy training, shared facilities, representation by the same union, and the common purpose of assisting the community. Finally, the County alludes to the frequent co-responses of firefighters and EMS personnel to various incidents.

At the outset, plaintiffs assert that the Court should decide this issue by interpreting only the statutory language. They contend that Congress, in passing 29 U.S.C. §207(k), explicitly chose to exempt firefighters and law-enforcers, *not* EMS personnel. Nonetheless, plaintiffs do recognize that the Court has the responsibility to interpret administrative regulations that reasonably construe the statute and, accordingly, plaintiffs respond to the regulations cited by the County.

Confronting the language of §553.210(a), plaintiffs first assert that they do not qualify as "rescue or ambulance service personnel." Plaintiffs also contend that their work is not integral to the activities of fire protection as required by the last two of the four enumerated factors set forth in §553.210(a), namely, the prevention, control or extinguishment of fires. As an alternative, plaintiffs follow the direction of "See §553.215," which essentially leads to two conditions for triggering an exemption for ambulance and rescue service employees: 1) they must have been trained to rescue, and 2) they must have been regularly dispatched to fires, crime

scenes, riots, natural disasters, and other accidents.[3] Although the County does not rely on §553.215 as previously set forth, plaintiffs assert that the County fails to satisfy either condition.

Even if plaintiffs are found to form an integral part of the fire department's fire protection activities, they claim nonexemption on the basis of 29 C.F.R. §553.212, which provides in pertinent part:

> (a) Employees engaged in fire protection . . . activities as described in §553.210 . . . may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection . . . activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat . . . the section . . . [207(k)] exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection . . . activities for purposes of this part.

Relying on this provision, plaintiffs uniformly represent that more than 90 percent of their work is unrelated to fire protection. On this basis alone, plaintiffs move the Court to grant their motion for partial summary judgment.

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[3] *See supra* note 2.

III

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3186 (1990). Under the strict standard of the Fourth Circuit, summary judgment is proper only when the parties agree on both the facts *and* the inferences drawn from those facts. *Morrison v. Nissan Co., Ltd.,* 601 F.2d 139, 141 (4th Cir. 1979).

The Court must thus decide whether a reasonable jury could find in favor of the non-moving party, taking all factual inferences in the light most favorable to the non-movant. *Helm v. Western Maryland Railway Co.,* 838 F.2d 729, 734 (4th Cir. 1988); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). It should be noted, however, that "the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson,* 477 U.S. at 249; *see Miller v. Leathers,* 885 F.2d 151, 154 (4th Cir. 1989), *cert. denied,* 111 S.Ct. 1018 (1991). Instead, the Court must simply decide whether there is a genuine issue for trial.

IV

In order to determine which facts are material in this action, the Court must sift through the parties' conflicting legal theories and identify the applicable rule of law.

The Court finds that the statutory language does not expressly bring EMS personnel within the terms of an exemption. Indeed, Congress specifically exempted employees involved in fire protection and law enforcement activities, *not* those engaged in medical services

generally. If Congress truly wished to expand the reach of its exemption, it could have used more general language, such as "emergency response activities."[4]

It is well settled that Congress, by expressly excluding certain categories from a statute's coverage, demonstrates an intent to include all others. *See e.g., Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 188 (1978); *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir. 1980), *cert. denied*, 449 U.S. 954. This principle of inclusion is especially important in the context of FLSA, for which the courts have traditionally drawn narrow exemptions. *See supra* p. 3. Thus, this Court has serious reservations about reading §207(k) expansively to exempt EMS personnel from the 40-hour overtime requirement. Nonetheless, the Court finds it appropriate to look to the DOL for guidance, provided the agency has reasonably construed the statute. *See Donovan v. KFC National Management Co.*, 682 F.2d 603, 604 (6th Cir. 1982). Such an approach is warranted by the acknowledged expertise of the DOL in dealing with labor issues.

In 29 C.F.R §553.210, the DOL has construed the term "any employee . . . in fire protection activities" to

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[4]The legislative history of this statutory provision is scarce. The most substantive interpretation was made in 1974 by the ranking member of the House General Labor Subcommittee, who expressed the belief that ambulance and rescue personnel fall within the exemption. Because the remarks of a single legislator hardly control a determination of congressional intent, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), this Court must generally treat the legislative history as inconclusive. For a full text of the legislator's remarks, see *Horan v. King County Division of Emergency Medical Services*, 740 F. Supp. 1471, 1476 n.3 (W.D. Wash. 1990).

refer to individuals who satisfy a four-prong test. In addition, "the term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215." Reading this last sentence, it might appear that the substance of an "integral part" test can be derived from the language of either §553.210 or §553.215. At the outset, the Court should indicate its reluctance to delve into and apply the complexities of §553.215, a provision that neither party genuinely invokes. Moreover, the "See §553.215" notation merely serves to refer the reader to a related regulation that applies to ambulance and rescue personnel of a public agency other than a fire department. Because plaintiffs are employed by the fire department, §553.215 is inapplicable by its own terms.[5] The Court shall therefore focus its attention on the internal language of §553.210.

In order to identify the substance of an "integral part" test within the contours of §553.210, the Court can either rely on the four enumerated factors or develop a separate and independent set of factors. Upon analysis, however, the Court concludes that a fire department's rescue and ambulance personnel must satisfy the four factors. In reaching this conclusion, the Court depends on a common sense interpretation of the regulatory language. For example, the drafters of the regulation chose to generally describe the term, "any employee . . . in fire protection activities," as referring to anyone who fulfills

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[5]Accordingly, the two cases cited by defendant, *Bond v. City of Jackson*, 939 F.2d 285, 287 (5th Cir. 1991), and *O'Neal v. Barrow County Board of Commissioners*, 743 F. Supp. 859, 862 (N.D. Ga. 1990), rely primarily on §553.215 and are similarly inapposite.

the four factors. The drafters then noted that "the term would also include rescue and ambulance service personnel [who] form an integral part of . . . fire protection activities." If the drafters truly wished to articulate a separate set of factors for ambulance personnel, they would not have opted for the word, "include." Because inclusion connotes similar treatment, the Court must apply the four factors to plaintiffs to determine whether they form an integral part of fire protection activities.

The County attempts to ignore these four factors and instead adopts a separate "integral part" test, which concentrates on the integration of EMS personnel into the fire *department*. The Court finds the County wrong on multiple grounds. First, the statutory and regulatory language expressly emphasizes an employee's activities – not his or her mere employment by the fire department. In addition, numerous courts have emphasized the primacy of function over form. *Carlson*, 925 F.2d at 265; *Reeves v. I.T.& T. Corp.*, 357 F. Supp. 295, 302-303 (W.D. La. 1973), *aff'd*, 616 F.2d 1342, 1351 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). Finally, the County's free-wheeling interpretation has been rejected even by the DOL, which supports the view that the work of ambulance personnel must be substantially related to "fire protection activities."

(Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2022 (1987)).

If plaintiffs in some manner satisfy these four factors, the County must further demonstrate under §553.212 that plaintiffs spend 80 percent or more of their time performing work that is an incident to or in conjunction with fire protection activities. If the County fails, the plaintiffs are entitled to overtime compensation after working forty hours in a week. In defining "fire protec-

tion activities," the Court finds most instructive the fourth factor of §553.210, which refers to activities "which are required for, and directly concerned with, the prevention, control or extinguishment of fires."

The County makes the surprising contention that §553.212 does not apply to EMS personnel. Not only is such an argument contrary to judicial authority, *Spires v. Ben Hill County*, 745 F. Supp. 690, 699 (M.D. Ga. 1990); *Horan v. King County Division of Emergency Medical Services*, 740 F. Supp. 1471, 1479 (W.D. Wash. 1990), but it ignores the structure and language of the regulations themselves. For example, §553.212 expressly relates to employees engaged in fire protection activities as described in §553.210. Moreover, the County glosses over the fact that former Secretary of Labor Elizabeth Dole has highlighted the importance of calculating the time an EMS employee devoted to fighting fires.[6] For all of these reasons, the Court cannot adopt the County's tenuous assertion.

V

Having identified the relevant legal standards, the Court is now prepared to apply the law to the facts. At the outset, plaintiffs have conceded that the County has met its burden of proving that they satisfy the first three factors of §553.210. (Plaintiffs' Response to the County's Motion, at 8). In other words, plaintiffs do not

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[6]In a letter ruling of August 2, 1990, Secretary Dole held a county in violation of labor regulations for improperly including some emergency medical service (EMS) employees within the definition of fire protection. Specifically, her "investigation disclosed that the EMS employees did not spend the *majority* of their work time during each work period in EMS service related to fire-fighting activities." (emphasis added). Ltr. Rul. (Aug. 2, 1990), *printed in* Fair Labor Standards Handbook 289-90 (ed. Mar. 1991).

dispute their employment by the fire department, their training, and their legal authority to fight fires. Plaintiffs, however, disagree that they perform "activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires" – the fourth factor. In order to evaluate this assertion, the Court must examine the general duties of the EMS personnel.[7]

John West, the lead plaintiff, whose experience is roughly similar to all plaintiffs, has stated by way of affidavit that his job typically consists of

> preparing for medical emergencies, traveling to medical emergencies, stocking the ambulance or emergency medical vehicle, administering first aid and other medical care in emergency medical situations, transporting patients to hospitals, cleaning and maintaining the ambulance and station, attending training sessions, studying emergency medical procedures and waiting to be called on emergency medical calls.

(Plaintiffs' Motion for Summary Judgment, Exhibit 1, para. 5). This focus on medical service obligations (as

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[7] In interpreting this fourth factor, the Court finds instructive the ruling in *Carlson v. City of Minneapolis*, 925 F.2d 264 (8th Cir. 1991). In *Carlson*, a case concerning arson investigators, the Eighth Circuit vividly demonstrated that an employee's mere association with fires is insufficient to fall subject to the exemption:

> [W] e agree with the district court that the investigators do not engage in fire protection activities. Although the investigators work for the Minneapolis Fire Department, are assigned to fire stations, respond to fire calls, and spend time at fire scenes, they do not "perform [] activities [that] are required for and [are] directly concerned with the prevention, control, or extinguishment of fires. . . ." 29 C.F.R. §553.210(a)(4).

925 F.2d at 265.

opposed to fire suppression duties) is confirmed by the official job description, which indicates that an "emergency medical technician paramedic"

> [p]erforms necessary emergency medical care on sick, injured, or convalescent persons at the site of the incident and enroute to the hospital or other destination . . . , [sic] places patient on stretcher and loads stretcher into ambulance; subdues violent patients; may drive ambulance, using knowledge and skill in driving to avoid sudden motions detrimental to patients; maintains ambulance, medical service equipment and living quarters; participates in specialized training courses.

(Plaintiffs' Motion, Exhibit 5: McNichol Exhibit 7, at 15.10.a.2). Moreover, even the Battalion Chief of the Fire Suppression Division, Stuart McNichol, has stated that plaintiffs' primary role is to provide emergency medical care. (Plaintiffs' Motion, Exhibit 4, at 51-52).

Despite this overall emphasis on medical services, the job description provides tangentially that EMS personnel also perform fire and rescue work. (Plaintiffs' Motion, Exhibit 5: McNichol Exhibit 7, at 15.10.1.6). In addition, West has admitted that on rare occasions he entered burning buildings or provided "minor outside firefighting assistance." (Plaintiffs' Motion, Exhibit 1, paras. 11, 14) Many of the other plaintiffs have had similar experiences. Therefore, because most plaintiffs may have minimal involvement in preventing, controlling, or extinguishing fires, the fourth factor of §553.210 may appear to be satisfied.

The analysis, however, does not end with the bare language of these four factors. Indeed, the County must further demonstrate that plaintiffs spend 80 percent or more of their time performing work that is an incident

to or in conjunction with fire protection activities. As the facts reveal, even assuming that every plaintiff satisfies the language of the fourth factor, not one plaintiff meets this 80 percent requirement.

On an individual basis, each plaintiff has stated in an affidavit that

> [s]ubstantially less than 20% of my time at work is spent performing activities which are required for and directly concerned with the prevention, control or extinguishment of fires even when including such incidental non-fire fighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

In addition, a statistical study of five months in 1990 revealed only one incident related to fire suppression or rescue activities. (Plaintiffs' Motion, Exhibit 3). Moreover, the fire department's annual reports from 1987 through 1989 show that plaintiffs were involved in fire-related activities for less than 10 percent of their time. (Plaintiffs' Motion, Exhibit 6). And even Battalion Chief McNichol admitted that EMS personnel spend less than 50 percent of their time involved in fire protection activities. (Plaintiffs' Motion, Exhibit 4, at pp. 98-99).

Based upon this unrefuted evidence, the Court concludes that the County falls far short of establishing the requisite 80 percent needed to transform EMS personnel into firefighters. Therefore, in light of both §§553.212 and 553.210 and the Court's obligation to construe

strictly any exceptions to customary overtime compensation, the Court denies the County's motion for summary judgment and grants plaintiffs' motion for partial summary judgment.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, on behalf of himself and
all other employees of Anne Arundel County Maryland
similarly situated, et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

ORDER

In accordance with the opinion filed today in the above-captioned case, IT IS, this 18th day of August, 1995, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiffs' Motion for Summary Judgment (Paper 150) BE, and the same hereby IS, GRANTED IN PART and DENIED IN PART, as follows:

(a) The motion is granted in regard to overtime compensation for all of the plaintiffs;

(b) The motion is granted in regard to plaintiffs' claim for prejudgment interest; and

(c) The motion is denied in all other respects;

(2) That defendant's Cross Motion for Summary Judgment (Paper 151) BE, and the same hereby IS, GRANTED IN PART and DENIED IN PART, as follows:

(a) The motion is granted in regard to plaintiffs' claim for liquidated damages;

(b) The motion is granted in regard to the application of the two-year statute of limitations;

(c) The motion is denied in all other respects; and

(3) That the Clerk shall mail a copy of this order and the accompanying opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. B-90-2281

JOHN D. WEST, on behalf of himself and
all other employees of Anne Arundel County Maryland
similarly situated, et al.

v.

ANNE ARUNDEL COUNTY, MARYLAND

Filed: August 18, 1995

Francis J. Collins, Esq., and Andrew H. Kahn, Esq., of Baltimore, Maryland, for plaintiffs.

Catherine Durkan, Esq. of Annapolis, Maryland, for defendant.

BLACK, JR., WALTER E., DISTRICT JUDGE

Presently pending before the Court are plaintiffs' Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment. This lawsuit was filed by more than 100 Emergency Medical Service Personnel (hereinafter "EMS personnel") of the Anne Arundel County Fire Department seeking compliance with the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. §207(a)(1). On a previous summary judgment motion, the Court determined that EMS personnel were not employees engaged in fire protection activity under the provisions of §7(k) of the Act, 29 U.S.C. §207(k), and therefore that the County must pay overtime after 40 hours rather than after 53 hours.

These cross motions for summary judgment address all remaining issues regarding overtime compensation. Plaintiffs contend that they are due overtime compensation for all hours worked in excess of forty hours per week because they do not fall within the exemptions from overtime for professional, executive, or administrative employees. The County agrees that Emergency Medical Technicians, Cardiac Rescue Technicians (CRTs), and EMS Lieutenants, other than EMS Field Lieutenant and EMS Training Lieutenant,[1] do not fall within any of the exemptions from the requirements; however, the County contends that all captains are exempt as executives or administrators, that Field Lieutenants are exempt as executives, that Training Lieutenants are exempt as administrators, and that all plaintiffs with paramedic certification are exempt as professionals. Plaintiffs also contend that they are entitled to liquidated damages and a three year statute of limitations, while defendants argue that liquidated damages are inappropriate, and that the correct statute of limitations is two years.

I

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §207(a)(1), requires that employees be paid time and a half for work over 40 hours per week. Section 13(a)(1) exempts from that requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). The burden of proving that an employee is exempt from the overtime

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[1] The ranks of EMS personnel involved in this litigation are: EMS Captain-Operations, EMS Captain-Training Coordinator, EMS Captain-Duty Officer, EMS Field Lieutenant, EMS Training Lieutenant, EMS Lieutenant, Emergency Medical Technician Paramedic, Cardiac Rescue Technician, and Emergency Medical Technician.

requirement is on the employer. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). Overtime exemptions are construed narrowly, against the employer. *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir. 1994). This burden must be satisfied by clear and affirmative evidence. *Clark v. J. M. Benson Co., Inc.*, 789 F.2d 282 (4th Cir. 1986); *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984).

As the County is claiming exemptions under the executive, administrative, and professional exemptions, it is necessary to review the regulations pertaining to both of those exemptions. The regulations provide both "long" and "short" tests to determine whether an employee fits within the applicable exemption. *See* 29 C.F.R. § §541.1, 541.3. The long test for both exemptions applies to lower-paid employees, while the short test applies to employees making at least $250 per week. *Id.* Because both sides agree that all plaintiffs earn at least $250 per week, the short test applies for both exemptions.

An employer is exempt from the requirement of paying overtime under the short test to a professional employee

> who is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of the performance either of work [requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes] . . . , which includes work requiring the consistent exercise of discretion and judgment . . . .

29 C.F.R. §541.3(e). The short test for an executive exempts an employee

> who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

29 C.F.R. §541.1(f). The short test for an administrative employee exempts one who

> is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of [the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers], which includes work requiring the exercise of discretion and independent judgment.

29 C.F.R. §541.2(e)(2). As all exemptions require that an employee be paid on a salary basis, the Court will address that issue first.

Salary Basis

The definition of a salaried employee, 29 C.F.R. §541.118(a), states

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality of the work performed. Subject to the

> exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

The regulations then provide three exceptions to the rule that employees must be paid their full weekly salary to qualify for an exemption from overtime: (1) deductions are permissible when the employee is absent for a day or more for personal reasons; (2) deductions are permissible, in accordance with a bona fide plan, when the employee is absent for a day or more for sickness or disability; and (3) penalties for "infractions of safety rules of major significance" are permissible. 29 C.F.R. §§541.118 (a)(2), (3) and (5). Deductions for absences due to jury duty, temporary military leave, or attendance as a witness are impermissible. 29 C.F.R. §541.118 (a)(4). Until September 18, 1992, deductions for partial day absences were impermissible for salaried employees. *See* 57 Fed. Reg. 37,666 (1992). However, at that time, due to concern that paying public sector employees for time they did not work was incompatible with public accountability, the Department of Labor issued a new regulation permitting deductions for absences of less than one work-day for public employees. 29 C.F.R. 541.5d.

Here, the peculiarities of a collective bargaining agreement give the pay scheme attributes of both an hourly and a salary basis. Many courts have struggled with the difficult task of applying rules designed for the private sector to employees of public agencies. In fact, several courts and judges have ruled that part or all of the salary basis test is invalid as applied to the public sector. *See Service Employees International Union, Local 102 v.*

County of San Diego, 35 F.3d 483 (9th Cir. 1994), *as amended on denial of rehearing*, 1994 U.S. App. LEXIS 40787 (9th Cir. July 19, 1995); *Hilbert v. District of Columbia*, 23 F.3d 429, 435 (D.C. Cir. 1994) (Henderson, J. concurring in part, dissenting in part); *McGrath v. City of Philadelphia*, 864 F. Supp. 466, 486 (E.D. Pa. 1994); *Stewart v. City and County of San Francisco*, 834 F. Supp. 1233, 1238 (N.D. Cal. 1993).

The basis for the Ninth Circuit's ruling in *Service Employees* is as follows: The Department of Labor regulations formulating the salary test were enacted in 1954, when the FLSA did not apply to public employers. In 1974, Congress amended the FLSA to cover public sector employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6, 88 Stat. 55, 59-63. However, in 1976, the Supreme Court ruled that the application of FLSA to public employees was unconstitutional. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In 1985, the Supreme Court reversed itself in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and Congress once again amended the FLSA. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787. In these amendments, Congress did not address the issue of whether the salary test should apply to public employees. Congress did state that "the bill extends minimum wage and overtime coverage to about 5 million *nonsupervisory* employees in the public sector." H.R. Rep. No. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837. The Ninth Circuit has interpreted that statement to mean that Congress intended public agencies to have the benefit of the executive and administrative exemptions. *Service Employees*, 35 F.3d at 487.

Thus, in 1986, public agencies were faced with the difficult task of complying with regulations that were enacted for private sector employers. In 1987, the Department of Labor recognized the problem and stated that it would not enforce that part of the salary basis test prohibiting deductions for absences of less than a day as to public employers. *See* 57 Fed. Reg. 37,668 (1992). Employees, on the other hand, were still permitted to file suit. *Id.* A wave of public sector employee lawsuits ensued and, in 1991, the Department of Labor issued an interim regulation altering part of the salary basis test for public employees, retroactive to April 16, 1986. 56 Fed. Reg. 45,824 (1991). In particular, the interim regulation permitted deductions for absences of less than one workday and permitted deductions caused by budget-required furloughs. *Id.* However, the interim regulation left all other aspects of the salary basis test unchanged as applied to public employers. *See* 57 Fed. Reg. 37,670 (1992). The interim rule was implemented without prior notice and comment because the Secretary of Labor found good cause to issue the rule without delay. *See id.* In several lawsuits, to which the Department of Labor was not a party, district courts ruled that the interim regulation was invalid for failure to comply with the notice and comment procedures of the Administrative Procedure Act. *See, e.g., Service Employees International Union, Local 102 v. County of San Diego,* 784 F. Supp. 1503 (S.D. Cal. 1992), *rev'd,* 35 F.3d 483 (9th Cir. 1994); *Alex v. California,* 1992 U.S. Dist. LEXIS 6795 (E.D. Cal. 1992). Although the Department of Labor disagreed, it withdrew the interim rule and instead issued the 1992 rule after following the Administrative Procedure Act. *See* 57 Fed. Reg. 37,672 (1992). Unlike the 1991 rule, the 1992 rule is not retroactive because the Department of Labor was concerned that a retroactive rule would be

invalid under *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), and its progeny, which held that a retroactive regulation is only valid if expressly authorized by Congress. *See* 57 Fed. Reg. 37,678 (1992).

The Court in *Service Employees* ruled that the Department of Labor's "interest in applying the new salary test retroactively is indicative of its firm conviction that its earlier iteration of the salary test conflicted with congressional intent." 35 F.3d at 489. The Ninth Circuit also relied on the fact that Congress intended that public agencies have the benefit of the executive and administrative exemptions from the overtime requirement, but that the salary basis test essentially deprived the public sector of these exemptions. *Id.* at 488-89. Therefore, the Court ruled that the salary basis test is invalid, in its entirety as applied to the public sector, as conflicting with the intent of Congress and thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" pursuant to the Administrative Procefure Act, 5 U.S.C. §706(2)(a). *Id.* at 489. *See Stewart*, 834 F. Supp at 1238. Because the Department of Labor stated that the partial-day docking rule was inappropriate when applied to the public sector, the County urges the Court not to apply this portion of the salary basis test here.

The Court agrees and finds as it did in the companion case, *Quirk v. Baltimore County*, Civil No. B-90-2983, that the partial-day docking rule is inconsistent with the intent of Congress and therefore invalid pursuant to *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the test set forth in *Chevron*, the Court must first look to see if the intent of Congress is clear on the question of whether the salary basis test should apply to the public sector. *Id.* If it is clear, the Court must "reject administrative construc-

tions which are contrary to clear congressional intent." *Id.* at 843, n.9. Where, as here, congressional intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 483. Courts give substantial deference to the expertise of an agency charged with the administration of a statute. *See, e.g. Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380 (1984).

This Court relies on the fact that the expert agency assigned to implement the Fair Labor Standards Act examined the regulations and found them inconsistent with the statute:

> With regard to the public sector . . . it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)-(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

57 Fed. Reg. 37,670 (1992). The Department of Labor also stated:

> It had become apparent to the Department . . . that the previously existing rules and enforcement policy

> were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments.

57 Fed. Reg. 37,671 (1992). In fact, the Department found the rule for partial-day absences ("docking rule") so inconsistent with the intent of Congress, that it attempted to promulgate a rule to make §541.5d operate retroactively. *See* 56 Fed. Reg. 45,829 (1991). Only the limited power of an executive agency to issue retroactive regulations prevented the Department from effectively eliminating the docking rule. The Department of Labor itself has determined that its regulation was not based on a permissible construction of §13(a). This Court, likewise, finds that because the docking rule was contrary to the expressed intent of Congress, the regulation is invalid as arbitrary, capricious, an abuse of discretion, and otherwise not in accord with the law.

However, as to the remainder of the salary basis test, the Court finds that the expert agency entrusted with interpreting the FLSA has examined the statute and regulations and determined that other aspects of the salary test could be applied to the public sector without unduly restricting the exemption. *See* 57 Fed. Reg. 37,673 (1992). While the salary basis test is clearly far from ideal and rather impracticable when applied to the public sector, there is no indication that it is not *a* permissible construction of the statute. The Court therefore defers to the Department of Labor's expertise and rules that the remainder of the salary basis test is not arbitrary and capricious.

In so doing, the Court declines to apply the ruling in *Service Employees* that the salary test was invalid in its

entirety. This conclusion is flawed, in part because it is based on the finding that the Department of Labor's "non-enforcement policy covered the entire salary test, not just part of it; and essentially no valid salary test applicable to the public sector existed until the DOL finally conducted rule-making in 1991 and 1992." *Service Employees* at 489 *as amended on denial of rehearing.* This finding is in error, since the enforcement policy issued by the Wage and Hour Administrator on January 9, 1987, was limited to the denial of "an exemption . . . to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident . . . ." 57 Fed. Reg. 37668. Instead, this Court adopts the reasoning of Chief Judge Posner in *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), namely, that after the promulgation of 29 C.F.R. §541.5d effective September 18, 1992, the requirements in the regulations are valid, thereby limiting any invalidity solely to the docking rule in regard to absences of less than a day for personal reasons or because of illness or accident.

As most of the salary basis test is still applicable to plaintiffs, the Court will examine the pay schedules set forth in the union contract to determine whether plaintiffs are being compensated for the quality or quantity of work performed. Article 12.2 of the union contract specifies that an employee's "regular wages shall be the annual salary for such employee's pay step within the pay grade assigned to the employee's regular job classification." Appendices II and III to the contract set forth annual salaries for steps 1 through 12 within grades F1 through F6. EMS personnel have an average workweek of 50 hours based on a schedule of 24 hours on duty followed by 48 hours off duty. The annual salary is therefore divided into 26 equal payments, based on 50 hours

of work per week, so that plaintiffs receive a predetermined base amount every two weeks. Although no hourly rate appears in the appendices, an hourly rate of pay is derived based on a 50 hour workweek. Plaintiffs are paid a base salary for 100 hours every two weeks, although in some pay periods they work less than 100 hours. The schedule works out to a regular repetitive pattern of 48 or 60 hours per week.

The pay scheme appears to have some hourly aspects. For example, plaintiffs receive overtime based on an hourly rate of pay when they work beyond their normal shifts or work on their scheduled days off. They receive out-of-class pay at an increased hourly rate if they substitute for another employee in a higher class. They receive an hourly shift differential for work at night. However, overtime alone does not make plaintiffs hourly employees. The regulations provide that additional compensation does not alter the status of salaried employees. 29 C.F.R. §541.118(b). The Fourth Circuit has interpreted this to mean that overtime does not defeat an otherwise authorized exemption for a salaried employee. *Hartman v. Arlington County,* 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd. on reasoning of lower court,* 903 F.2d 290 (4th Cir. 1990).

The pay scheme here is similar to that in *Simmons v. City of Fort Worth, Texas,* 805 F. Supp. 419 (N.D. Tex. 1992), in which the Court ruled that district and deputy fire chiefs were salaried employees under the Fair Labor Standards Act. Plaintiffs in that case worked particular shifts; they were on duty for twenty-four hours and off-duty for forty-eight hours. However, they received a bi-weekly pay check for eighty hours regardless of the time worked. Likewise, in *Masters v. City of Huntington,* 800 F. Supp. 363 (S.D. W. Va 1992), the Court ruled that

deputy fire chiefs and captains were paid an annual salary. Their pay schedules set forth hourly rates of pay, but to arrive at the amount owed bi-weekly, the City divided their annual salaries by twenty-six, the number of pay periods in a year. They were paid the same base salary whatever they worked between 96 and 144 hours during the pay period. They were, however, paid for work beyond their regularly scheduled shifts on an hourly basis. Following Fourth Circuit precedent, the Court ruled that additional pay at an hourly rate does not defeat the exemption, because it is expressly permitted by the regulations. *Id.*

If the analysis were to end here, the Court would rule that plaintiffs are paid on a salary basis. They receive a minimum predetermined amount every two weeks, plus additional compensation in the form of overtime. They are paid for 50 hours of work each week, even if they only work 48 hours. All shift differentials work to plaintiffs' benefit; none reduce their salaries based on the quantity of work performed. However, the analysis does not end here, as the regulations specify other requirements for salaried employees.[2]

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[2] Plaintiffs argue that their salaries are impermissibly docked for maternity leave and for appearance as witnesses in court in non-work related matters. However, these arguments are without merit. The County has a bona fide plan which provides paid disability leave. Under the plan, maternity leave is treated like any other disability. Deductions for illness absences of more than a day are permissible under 29 C.F.R. §541.118(a)(3). Likewise, the County provides paid court leave for jury duty or attendance as witness in a case related to employment with the County. Sections 13.3, 13.4. The Fourth Circuit has ruled that an employer need not provide paid leave for an employee to engage in personal litigation. *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993).

First, plaintiffs argue that their salaries are reduced, in violation of the regulations, when they are absent on temporary military duty. *See* 29 C.F.R. 541.118(a)(4). The union contract provides 20 days of paid military leave. The County has submitted no evidence regarding the consequences if an employee's military obligation exceeded 20 days. Presumably, an employee could use any available leave time, but would be required to take leave without pay after exhausting accrued leave. Neither side has indicated whether any plaintiff was ever docked for military leave over 20 days.

The Court has found no legal authority as to the meaning of "temporary military leave" either in the regulations or applicable case law. The County provides 20 days of paid military leave, and there is nothing in the record before the Court which establishes that military leave beyond 20 days is nevertheless temporary. The County's military leave policy is clearly reasonable to cover the usual situations involving an employee's annual summer National Guard duty or an emergency activation to meet the needs of some natural disaster or riot conditions. It would be a strained interpretation of the word "temporary" to apply it to a full scale mobilization of the Armed Forces or to service in time of war. Accordingly, the Court finds that the County has not violated 29 C.F.R. §541.118(a)(4) in regard to temporary military leave. In any event, §541.118(a) adopts the general rule "that an employee need not be paid for any workweek in which he performs no work." Consistent with this general rule, the County would not be required to pay its employees on full-time military duty during their absence for that purpose.

Second, the Court must address plaintiffs' position that the County policy permitting the docking of pay for

infractions, other than infractions of safety rules of major significance, also constitutes an impermissible deduction of salary.[3] The Fourth Circuit has ruled that "disciplinary reductions in pay, other than for violations of major safety rules, constitute reductions in pay based on the quantity and quality of the employee's work." *Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993). In his affidavit, plaintiff John West states "Plaintiffs . . . are subject to deduction of wages for disciplinary matters involving less than 'infractions of safety rules of major significance.' "[4] Defendants have submitted the affidavit of Stephen Halford, Deputy Chief, Administration for the Anne Arundel County Fire Department who states that "[t]here has been no occasion when an exempt Lieutenant or Captain has been subjected to a disciplinary suspension of less than one week." Defendants have not submitted any evidence regarding such deductions for paramedics. In this regard, Fourth Circuit authority is lacking since it is not clear whether any plaintiff in *Shockley* actually was docked for the minor rule infraction at issue, namely, failure to report absence from work.

Thus, the question is whether being subject to an impermissible reduction is sufficient to defeat the exemp-

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[3] Unlike reductions for partial day absences, the 1992 amendment to the regulations did not alter the prohibition on deductions for minor infractions for public employees. 57 Fed. Reg. 37674 (1992) (Department of Labor found "no sufficient basis for distinguishing between the public and private sectors in regard to deductions for safety infractions").

[4] The Court notes with interest that, in the same paragraph of the affidavit, West states that plaintiffs are "docked" for absences of less than one day and excess maternity leave in contrast to the use of the words "subject to deduction" in the portion quoted in the text.

tion. Several courts have held that if an employee's pay can theoretically be docked under the applicable pay scheme, that employee is "subject to deduction" within the meaning of §541.118(a). *See, e.g., Kinney v. District of Columbia,* 994 F.2d 6, 11 (D.C. Cir. 1993); *Abshire v. County of Kern,* 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991); *D'Camera v. District of Columbia,* 693 F. Supp. 1208, 1212 (D.D.C. 1988); *Banks v. City of North Little Rock,* 708 F. Supp. 1023, 1025 (E.D. Ark. 1988); *Hawks v. City of Newport News,* 707 F. Supp. 212, 215 (E.D. Va. 1988); *Persons v. City of Gresham,* 704 F. Supp. 191, 194 (D. Or. 1988); *Lacey v. Indiana State Police Department,* 810 F. Supp. 244 (S.D. Ind. 1992); *Pautlitz v. Naperville,* 781 F. Supp. 1368, 1371-72 (N.D. Ill. 1992). These courts have relied on the fact that the regulations specifically require that an employee be "subject to deduction" and not that an employee's pay actually be docked.

Other courts have refused to destroy an exemption merely because employees are subject to reductions in pay. *McDonnell v. City of Omaha,* 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied,* 114 S. Ct. 1188 (1994); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta,* 920 F.2d 800, 805 (11th Cir. 1991); *Harris v. District of Columbia,* 709 F. Supp. 238, 241 (D.D.C. 1989). The court in *Harris* relied, in part, on a 1986 Department of Labor letter ruling which states:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is

> claimed, including those weeks when no deductions are made.

These courts have also held that if plaintiffs can show no evidence of an employee being impermissibly docked, the employer has met its burden of proving that employees' pay was not "subject to deduction."

The Court finds the reasoning of this line of cases more persuasive. Accordingly, the Court must look to the record presented by the County in carrying its burden of proof on this issue. The Halford affidavit establishes that no lieutenant or captain has been subjected to a disciplinary suspension of less than one week,[5] but this contrasts sharply with the preceding paragraph of the affidavit which states "[t]here has been no occasion when an otherwise FLSA-exempt fire department employee has been docked pay for an absence of less than a day . . . ." This careful use of language leads to the inescapable conclusion that paramedics have been subjected to disciplinary suspensions of less than one week, and the Court so finds, based on the evidence presented by the County.[6] Accordingly, the County has failed to demonstrate that the plaintiffs' pay is not subject to reduction because of the quality or quantity of work. Even if there had been any inadvertent disciplinary suspensions, it would not result in loss of the exemption if the County properly corrected its policy through the "window of correction" allowed under 29 C.F.R. §541.118(a)(6) which states:

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[5]Disciplinary suspension of more than one week does not affect the exemption, since the general rule enunciated in 29 C.F.R. §541.118(a) provides "that an employee need not be paid for any workweek in which he performs no work."

[6]The fact that no lieutenant or captain was ever subjected to a disciplinary suspension of less than one week does not detract from the fact that such disciplinary suspensions were County policy so long as any paramedic was so disciplined.

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case . . . where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

There is no evidence whatsoever that the County ever reimbursed any employee for such a deduction or that the County ever took any action that would constitute a promise to comply in the future. Under the circumstances, the County has not utilized the "window of correction" under §541.118(a)(6).

Therefore, because County policy in regard to discipline for infractions other than infractions of safety rules of major significance is not permissible under the regulations, the Court finds that plaintiffs are subject to reduction based on the quality or quantity of work performed and are therefore not paid on a salary basis under the regulations.

Professional Exemption

The County is asserting a professional exemption for all plaintiffs who are certified as paramedics. Apparently this is an issue of first impression, as neither party has cited to a case addressing it. Plaintiffs argue that in addition to not being paid on a salary basis, that they do not have enough education to be exempt as professionals, and that they do not exercise discretion.[7] Normally a finding that plaintiffs are not paid on a salary basis would eliminate the necessity of any discusson by the Court of

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[7]It is undisputed that all plaintiffs earn at least $250 per week.

the remaining issues concerning the professional exemption. However, the Court is well aware of the extremely complex nature of this litigation and finds it prudent to address all of the issues involved. Therefore, the Court will discuss the remaining professional exemption issues even though its finding on the salary basis issue alone assures that paramedics are not entitled to the professional exemption.

The regulations regarding professionals are set forth at 29 C.F.R. §541.300 and state "[t]he term 'professional' is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study." The regulations distinguish between learned professions and artistic professions. To be a learned profession requires "that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level." §541.301(b). Furthermore,

> The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology . . . will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study

> has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of §541.3(a)(1) of the regulations.

29 C.F.R. §541.301(e)(1). The regulations also require that the work of a professional must involve the consistent exercise of discretion and judgment. 29 C.F.R. 541.3(b).

As the regulations do not address the status of paramedics, the parties have looked for analogies in similar jobs covered by the regulations. The County relies on the fact that nurses have traditionally been exempt as professionals. 29 C.F.R. §541.301(e)(1). Plaintiffs, on the other hand, compare paramedics to medical technologists, who are not professionals unless they have three years of study in college plus a fourth year of course work in a school of medical technology. *Id. See also, Brennan v. South Davis Community Hospital,* 538 F.2d 859 (10th Cir. 1976) (holding that chief x-ray technician was not exempt as a professional).

The parties do not appear to have a material dispute over the amount of training a paramedic needs. Plaintiffs argue that they are required to have a high school education, plus training amounting to less than one year in college. Article 8 of the Anne Arundel County Code states that a paramedic must have the following qualifications:

> Graduation from high school, successful completion of the Anne Arundel County Fire Training Academy Program, certification as a nationally registered emergency medical technician paramedic and cardiac rescue technician by the Maryland State Board of Medical Examiners, possession of a valid non-

commercial class D motor vehicle operator's license issued by the state and the ability to obtain a class A motor vehicle operator's license issued by the State.

The evidence reveals that paramedics must complete 110 hours of classroom and practical instruction to become certified as an EMT, then an additional two full-time college level semesters to become a paramedic. Paramedics also have a continuing education requirement of 72 hours of course work every two years. As for the amount of college credit required to become a nurse, defendants have submitted the affidavit of the Executive Director of the Maryland Board of Nursing to show that while many nursing programs require four years of study, Maryland has approved 14 community college programs leading to a degree in nursing, which require approximately 2 years of study.

Although paramedic training is indeed rigorous, the Court finds that paramedics do not have the necessary education to be considered professionals under the regulations. The regulations state that "an advanced academic degree is a standard (if not universal) prerequisite" to being considered a professional. 29 C.F.R. §301(e)(1). In *Dybach v. Florida Department of Corrections*, 942 F.2d 1562, 1565 (11th Cir. 1991), the Court held that a professional position "must call for a person who is in a learned profession with at least a college degree in a specialized type of learning" and further held that a generalized college degree was insufficient. *Id.*

The parties also dispute whether a paramedic's duties involve the exercise of discretion. The record establishes that they are not allowed to exercise discretion but are required to follow strict protocols and to respond to the

directions of a physician with whom the paramedic has established electronic communication.

Paramedics are not required to have any, much less an advanced, academic degree. Nor do they meet anything comparable to the medical technologist requirement of three years of college plus an additional year of course work in a school of medical technology. Whatever a comparison of the educational requirements for a nurse and a paramedic shows, a nurse generally receives a college degree in nursing. A paramedic, on the other hand, receives advanced technical training. Therefore, the Court finds that, even if plaintiffs were paid on a salary basis, they would not be exempt as professionals.

Executive Exemption

The County is claiming an executive exemption for all plaintiffs with the rank of EMS Captain-Operations, EMS Captain-Training Coordinator, EMS Captain-Duty Officer, and EMS Field Lieutenant. Under the short test, the County must show (1) that plaintiffs are paid on a salary basis; (2) that it is plaintiffs' primary duty to manage a recognized department or subdivision of the enterprise; and (3) that plaintiffs customarily and regularly direct the work of two or more employees. 29 C.F.R. §541.1(f). As with the professional exemption, normally the issue of the executive exemption would be rendered moot by the Court's ruling on the salary issue. It is undisputed that the plaintiffs seeking an executive exemption are paid a salary in excess of $250 per week and that they direct the work of two or more other employees. However, in the interest of throroughness, the Court will address the remainder of the executive issues.

The Fourth Circuit has recently addressed the regulations interpreting the primary duty test:

> Analysis of whether an employee's primary duty is management begins with determining which of the employee's duties involve management of a recognized department or subdivision of the employer. As a 'rule of thumb,' the employee must devote more than fifty percent of his time to these duties. 29 C.F.R. §541.103 (1992). Other pertinent factors, however, may indicate that management is the employee's primary duty. Among the factors to be considered are: (1) the relative importance of the managerial duties as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

Shockley, 997 F.2d at 25-26.

Plaintiffs have submitted the affidavit of John West, an EMT-Paramedic, to describe the duties of those plaintiffs for whom an executive exemption is claimed. According to the affidavit, lieutenants and captains perform some supervisory functions when on a medical call, but patient care is their primary concern and, accordingly, plaintiffs assert that they are working foremen rather than executives. In addition, plaintiffs claim that captains cannot hire, fire, or impose discipline, and they may not award bonuses or commendations; instead, they can recommend discipline. Plaintiffs argue that the fire suppression captain or lieutenant, rather than the EMS captain or lieutenant, at each station manages EMS personnel when they are not on a medical call. Because captains and lieutenants are members of the union, and grievances must go to employees outside the bargaining unit, captains and lieutenants are not involved in adjudicating grievances.

Defendants have submitted the affidavits of Stephen Halford, Deputy Chief, Administration, for the Fire Department, and Roger C. Simonds, Deputy Chief of Emergency Medical Services and Special Operations for the Fire Department, to detail the duties of those employees for whom the executive exemption is claimed.

The duties of EMS Captain-Operations include "planning, organizing, directing and administration of the EMS Division." He is in charge of all personnel under the rank of Captain-Operations. Duties include assigning, training, and supervising personnel, and handling discipline. The Captain is involved in formulation of the budget, and in inspecting and evaluating equipment and apparatus. The EMS Captain also handles contact with the public. Finally, the Captain has administrative responsibilities including maintaining payroll, personnel, and leave records. According to Simonds, a Captain's recommendations regarding promotion and firing are given significant consideration. The Operations Captain rarely responds to emergency calls, unless the call is a multiple alarm or other major incident.

The EMS Captain-Training Coordinator develops, coordinates, and delivers EMS training. His responsibilities include evaluating training techniques, supervising the EMS Training Section personnel, and establishing the direction of the training program. The Training Coordinator writes lesson plans and determines the content of any training course. He maintains training records for all personnel, supervises the use of training facilities, studies both current and new techniques and makes recommendations regarding improvements. The Training Coordinator is the liaison with any county, state, or federal agency related to training. Like the Operations Captain, the Training Coordinator rarely responds to emergency calls, unless the call involves a major incident.

The EMS Captain-Duty Officer is the commanding officer of a shift of EMS personnel. The Duty Officer coordinates training and drills, directs the work of personnel in the field, and makes recommendations on personnel matters. He also performs such administrative duties as maintaining payroll, personnel, and leave records. The Duty Officer is responsible for allocating resources for an emergency, and in controlling and directing emergency scenes. He also represents management at disciplinary hearings as directed. The Duty Officers respond to all "Rescue, Special, Multi-injury, [or] other life hazard assignments as dispatched during their assigned tour of duty."

The EMS Field Lieutenant directs operations in the field, manages personnel, including payroll and leave records, inspects supplies, apparatus, and quarters, and recommends changes in equipment and procedures. He is required to maintain operational readiness, and report on experiences in the field. He often responds to medical calls, but while on calls, he acts as supervisor, commanding other officers on the scene.

Simonds' uncontradicted testimony reveals that captains spend more than 50 percent of their time on management. Plaintiffs admit that captains generally do not go on emergency medical calls. Simonds also states that the EMS Field Lieutenants spend more than 50 percent of their time on management; however, plaintiffs have submitted an affidavit stating that Field Lieutenants spend more than 50 percent of their time on patient care. Because the testimony regarding captains is different from the testimony regarding EMS Field Lieutenants, the Court will analyze them separately.

Captains spend almost all of their time managing personnel, evaluating personnel performance, attending man-

agement meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates. While plaintiffs are correct that under the collective bargaining agreement, captains cannot handle grievances, their recommendations regarding hiring, firing, and discipline are given significant consideration. The regulations set forth work that is typically done by management employees:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

29 C.F.R. §541.102(b). As the captains perform the vast majority of these duties more than 50 percent of the time and rarely spend time on direct patient care, under the "rule of thumb," their primary duty is management.

Even if captains did not spend 50 percent of their time on management activities, their primary duty would still be management. Applying the four factors discussed in *Shockley*, the Court finds that (1) although patient care is the ultimate objective of all EMS personnel, captains are the primary on-site managers for all other ranks of

EMS personnel; (2) captains must exercise significant managerial discretion in evaluating subordinates, managing equipment distribution, and directing employees in the field;[8] and (3) the EMS Captain-Operations is the highest ranking EMS employee at each fire station; the EMS Training Coordinator is the highest level employee in charge of training, and the EMS Captain-Duty Officer is the commanding officer of a shift of EMS personnel; accordingly, all are relatively free from supervision. As for the fourth factor, neither party has submitted any data regarding the relative pay between those for whom the executive exemption is claimed and those for whom it is not claimed. Even without the fourth factor, the Court finds that under the standard set forth in 29 C.F.R. §541.103, as enunciated more fully in *Shockley*, the primary duty of the EMS Captain is clearly management.

Plaintiffs next argue that captains do not manage a recognized department or subdivision of the fire department. They maintain that at most, EMS Captains supervise one fire station. The County's evidence reflects that each captain manages a recognized department or subdivision of the fire department, either a station or a shift of officers.

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[8] In fact, the captains' responsibilities here are very similar to those of the officers found to be executives in *Shockley*, where the Fourth Circuit stated:

> Their responsibilities extended not only to direct supervision of their subordinates, but also to the evaluation of the subordinates and to the management of both the people and equipment assigned to their units. These responsibilities required the exercise of considerable discretion, discretion that typically is not given to a working foreman.

997 F.2d at 27.

According to the regulations, "the phrase 'a customarily recognized department or subdivision' is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function." 29 C.F.R. §541.104(a). A fire station is recognized as a unit with permanent status and function. *Masters*, 800 F. Supp. at 366; *Hartman*, 720 F. Supp. at 1229. Similarly, the EMS unit located at a fire station is also a unit with permanent status and function. As for the shift commanders, the Court finds that captains who manage a shift do manage a recognized department or subdivision of the fire department. The shift is the essential work force unit, and although it consists of different employees at different times, it does have a permanent status and function. Furthermore, the regulations at 29 C.F.R. §541.104(e) state that an otherwise exempt employee will not "lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function." Thus, the Court finds that although the captains are not paid on a salary basis, their primary duty is management and they do manage a recognized department of government. Therefore, if Captains were paid on a salary basis, they would qualify for the executive exemption.

The result is different for the EMS Field Lieutenant. The Field Lieutenant is essentially the supervisor in the field. He performs the same functions as the paramedics, although he is the person in charge. While he has some management responsibilities, patient care appears to be his primary duty. The 50 percent of the time plaintiffs claim he spends in management, or supervising others in the field, is actually better described by the concept of

the working foreman. The regulations outlining the working foreman are set forth at 29 C.F.R. §541.115(a)-(c) and state in relevant part:

> The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is only remotely related to his supervisory activities.

29 C.F.R. §541.115(a). The regulations go on to explain that a working foreman performs the same type of work as that performed by his subordinates; however, he is also the supervisor. 29 C.F.R. §541.115(b). Even if a working foreman is responsible for maintaining time records or inspecting equipment, he should still not be considered an executive. 29 C.F.R. §541.115(c)(2)-(3). Here, the EMS Field Lieutenant works side by side and performs the same work as his subordinates. While he may be the highest ranking officer on a particular emergency call, he will still have a supervisor at the station. The EMS Field Lieutenant's job simply does not have the indicia of executive status that the Captains' jobs do; therefore the Court finds that, even if the EMS Field Lieutenant was paid on a salary basis, he would not be exempt as an executive employee.

Administrative Exemption

The County is claiming an administrative exemption from the requirement to pay overtime for all plaintiffs with the rank of EMS Training Lieutenant. Under the short test, Anne Arundel County must show (1) that plaintiffs are paid not less than $250 per week on a salary basis; (2) that plaintiffs' primary duty consists of "office

or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers"; and (3) that the work requires the exercise of discretion and independent judgment. 29 C.F.R. §541.2(e). The issue of the administrative exemption would normally be rendered moot by the Court's ruling that plaintiffs are not paid on a salary basis. It is undisputed that the plaintiffs seeking an administrative exemption are paid a salary in excess of $250 per week. However, in the interest of thoroughness, the Court will address the issue.

The regulations detailing employment in an administrative capacity state:

> (a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describe those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers . . . .
>
> (c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations' is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those [whose] work affects policy or whose responsibility it is to

> execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of business.

29 C.F.R. §541.205(a), (c).

The undisputed evidence establishes that the EMS Training Lieutenant develops, coordinates, implements and conducts EMS training programs. The Lieutenant also prepares lesson plans and training aids, supervises delivery of training and tests and evaluates new equipment. It is further undisputed that the EMS Training Lieutenant spends more than 50 percent of his time on administrative duties. The "rule of thumb" that an executive must spend more than 50 percent of his time on executive duties applies to administrative employees as well. 29 C.F.R. §206(b). From the evidence, the Court finds that the EMS Training Lieutenant's duties are directly related to the operation of the EMS division. The formulation and delivery of training is essential to the management of the Fire Department. While the EMS Training Lieutenant also goes out on medical calls, because he performs administrative work more than 50 percent of the time, the Court finds that his primary duty is administrative work.

The final requirement for the administrative exemption is that the work must require the exercise of independent judgment and discretion. The County has offered no evidence that the position requires the exercise of independent judgment and discretion.[9] Therefore,

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[9]It is noted that the Simonds' affidavit states that all captains are expected to exercise independent judgment and discre-

[footnote continued]

the Court finds that the EMS Training Lieutenant does not meet the third requirement of the test for the administrative exemption and, accordingly, even if he were paid on a salary basis, he would not be exempt as an administrative employee.

Absolute Defense

The County maintains that it is entitled to an absolute defense, based on 29 U.S.C. §259(a) which provides:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act of 1938, as amended . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Here, the County cites a February 7, 1989, letter ruling from the Department of Labor to a municipal employer who sought advice concerning the application of the FLSA to employees of a fire department.[10] The em-

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tion, but is silent as to lieutenants, including EMS Training Lieutenants.

[10]The County also cited letter rulings issued October 11, 1985, and October 21, 1987, as indicating that paramedics are

[footnote continued]

ployer had nine questions about fire department employees, several of which dealt with the issue of whether paramedics could "volunteer" to fight fires or perform other office work. The question and answer relied on by the County here states:

> Q.4. Are paramedics/firefighters employed by ____ considered to be fire protection employees so that the overtime pay exemption under section 7(k) can be applied to their employment?"
>
> A.4. Yes. Since ____ paramedics/firefighters are certified firefighters, they are considered to be engaged in fire protection activities for the purposes of section 7(k). See sections 553.210(a) and 553.-215.

Neither the question nor the answer provide any factual background to inform the County whether its situation is similar to that of the employer involved. That employer's request for a ruling is not reproduced, so the County had no way of knowing whether the paramedics employed by that employer had similar duties and responsibilities. "To establish reliance, the administrative interpretation relied upon must provide a clear answer to the particular situation." *Burnison v. Memorial Hospital, Inc.*, 820 F. Supp. 549, 558 (D. Kan. 1993) (disallowing good faith defense because administrative regulation relied upon was too general); *see also Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 927 (11th Cir. 1987) (stating that "an employer's actual reliance upon his own incorrect interpretation of a vague and general administrative guideline will not suffice"). The February 7, 1989, letter ruling does not provide a clear answer to the particular situation and, therefore, the County has not provided a com-

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exempt if their work is integrally related to their employer's fire protection activities.

plete defense to liability under 29 U.S.C. §259. In any event, there is no evidence whatsoever that the County acted in reliance on any of the letter rulings cited.

Good Faith and Liquidated Damages

Because the Court has ruled that all plaintiffs are entitled to overtime compensation, it must next address the issue of liquidated damages. The parties disagree over whether defendants have put forth sufficient evidence of good faith to escape the otherwise mandatory liquidated damages. Section 216(b) of FLSA provides that an employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. §216(b). The Portal-to-Portal Act, 29 U.S.C. §260, provides a limited defense to §216:

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had a reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in §216 of this title.

The limited defense requires the employer to show both that it acted in good faith and that it had reasonable grounds to believe it was not violating the FLSA. *See Horan v. King County, Div. of Emergency Medical Services,* 740 F. Supp. 1471, 1481 (W.D. Wash. 1990) (finding good faith and reasonable grounds); *Dybach,* 942 F.2d at 1567 (holding that employer failed to demonstrate reasonable grounds). "The good faith requirement

mandates the employer have 'an honest intention to ascertain and follow the dictates of the Act.' " *Renfro v. City of Emporia,* 948 F.2d 1529, 1540 (10th Cir. 1991), *cert. dismissed,* 503 U.S. 915 (1992) (quoting *Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir. 1982). Good faith requires some investigation of potential liability. *Horan,* 740 F. Supp. at 1481. An employer cannot "simply remain blissfully ignorant of FLSA requirements." *Burnley v. Short,* 730 F.2d 136, 140 (4th Cir. 1984).

The Court finds that the County has met its burden of showing good faith and a reasonable grounds for believing it was not violating the Fair Labor Standards Act. After the *Garcia* decision, the County evaluated the duties and responsibilities of its employees as indicated by the letters it sent to the employees advising them of the County's determination in regard to their exempt status. The position taken by the County was reasonable in light of the absence of Fourth Circuit precedent, the presence of supporting legal authority, and the historic integration of fire and emergency medical services. While this Court ultimately ruled that EMS personnel did not qualify as exempt under §7(k) of the Act, the resolution of the legal issues involved in this case is still in doubt to this very day, despite the expenditure of substantial judicial resources nationally over the last decade. The absence of precedent is also evidence of good faith. *Bond v. City of Jackson,* 727 F. Supp. 1516, 1519 (S.D. Miss. 1989), *rev'd on other grounds,* 939 F.2d 285 (5th Cir. 1991).

Statute of Limitations

In order to determine the appropriate statute of limitations, the Court must address the issue of whether the County's violation of the FLSA was willful. If the Coun-

ty's violation was willful, a three year statute of limitations applies; if it was not willful, a two year statute of limitations applies. 29 U.S.C. §255(a). In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Supreme Court noted that "willful" is considered synonymous with "deliberate" and "intentional." Willfulness requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* Negligent conduct is not willful. *Id.* In addition, good faith is a defense to willfulness, *Burgess v. Catawba County*, 805 F. Supp. 341 (W.D. N.C. 1992), "as good faith is necessarily inconsistent with knowing or reckless disregard." *Id.* at 351. *See also Dole v. Haulaway, Inc.*, 723 F. Supp. 274, 288 (D.N.J. 1989), *aff'd*, 914 F.2d 242 (3d Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). For the reasons stated in the discussion of liquidated damages, the Court finds that Baltimore County was not willful, so the proper statute of limitations is two years.

Prejudgment Interest

In the absence of liquidated damages, plaintiffs argue that prejudgment interest should be awarded. "In the Fourth Circuit, the prevailing standard appears to be that the decision to award prejudgment interest is a discretionary one for the trial court, which should consider the equities of the particular case." *Thomas v. County of Fairfax*, 758 F. Supp. 353, 368 (E.D. Va. 1991), *aff'd without op.*, 16 F.3d 408 (4th Cir. 1994); citing *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). The purpose of prejudgment interest is to make plaintiff whole. *See Cline v. Roadway Express, Inc.*, 689 F.2d 481 (4th Cir. 1982).

The Fourth Circuit has not ruled on whether a finding of good faith on defendant's part precludes the award of prejudgment interest. However, in this district, courts have ruled that "an employer's good faith is not a sufficient reason for denial of pre-judgment interest." *Marshall v. Board of Education,* 470 F. Supp. 517, 519 (D. Md. 1979), *aff'd* 618 F.2d 101 (4th Cir. 1980); *see also Marshall v. Gerwill, Inc.,* 495 F. Supp. 744, 755 (D. Md. 1980).

On balance, the Court finds that the equities in this case weigh in favor of the award of prejudgment interest. Primarily, the fact that the Court has upheld the County's good faith defense to liquidated damages leaves the plaintiffs without that relief to alleviate their losses from the delayed payment of wages to which they are entitled, as well as the erosion of their earnings as a result of inflation. In the companion case, *Quirk v. Baltimore County,* Civil No. B-90-2983, the Court did not award prejudgment interest because of a windfall created for the plaintiffs there caused by the unusual structure of their workweek. There is no comparable windfall in this case. Therefore, the Court finds that plaintiffs are entitled to prejudgment interest in order to be made whole for the period of time when they were unlawfully denied use of their wages. Prejudgment interest shall be awarded, as requested by plaintiffs, compounded monthly, in accordance with the rate used by the Internal Revenue Service on the underpayment of taxes.

For all of the foregoing reasons, the Court will grant in part and deny in part plaintiff's Motion for Summary

Judgment. Likewise, the Court will grant in part and deny in part defendant's Motion for Summary Judgment. A formal order will be entered in conformity with this Opinion.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

CIVIL ACTION NO.: B 90-2881

JOHN D. WEST, et al.

Plaintiffs

vs

ANNE ARUNDEL COUNTY, MARYLAND

Defendant

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion filed on August 18, 1995, as amended by order of October 6, 1995,

IT IS, this 18th day of January 1996, by the United States District Court for the District of Maryland,

ORDERED:

(1). That final judgment is hereby entered in favor of the Plaintiffs and against Anne Arundel County, in the amounts and in the names of the Plaintiffs indicated on Exhibit 1 hereto. Said amounts constitute the damages for each listed Plaintiff accrued through December 6, 1995.

(2). The Court hereby dismisses any request for injunctive relief by agreement of the parties.

(3). The judgment includes prejudgment interest as indicated in Exhibit 1 through December 6, 1995. The judgment shall begin to accrue interest pursuant to 28 U.S.C. §1961(a) as of December 7, 1995.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

[The following material is a condensation of Exhibit 1 to the Final Judgment entered by the United States District Court for the District of Maryland. Because of the length and cumbersome nature of Exhibit 1, and with the concurrence of Respondents' counsel, Petitioner includes herein only the total sum of damages due to each Respondent. These sums include the total amounts due from August 1988 through December 6, 1995, and the compounded monthly prejudgment interest on those sums.]

[EXHIBIT 1]

ANNE ARUNDEL COUNTY FIRE DEPARTMENT
EMS FSLA YEARLY TOTALS

ALEXANDER, J.G.		BAILEY, S.L.	
Grand Total, 1988-1995		**Grand Total, 1988-1995**	
Amount Due	$31,109.96	Amount Due	$26,751.10
C.M.I.*	6,791.70	C.M.I.*	6,278.45
TOTAL	$37,901.66	TOTAL	$33,029.55

AMBROZEWICZ, S.P.		BANKE, K.S.	
Grand Total, 1988-1995		**Grand Total, 1988-1995**	
Amount Due	$2,622.20	Amount Due	$8,716.57
C.M.I.*	1,288.50	C.M.I.*	619.94
TOTAL	$3,910.70	TOTAL	$9,336.51

ANDERSON, M.C.		BOND, B.L.	
Grand Total, 1988-1995		**Grand Total, 1988-1995**	
Amount Due	$25,023.33	Amount Due	$2,856.00
C.M.I.*	4,856.73	C.M.I.*	1,550.08
TOTAL	$29,880.06	TOTAL	$4,406.08

ANDRESKY, M.G.		BOSLEY, D.	
Grand Total, 1988-1995		**Grand Total, 1988-1995**	
Amount Due	$24,585.70	Amount Due	$30,508.11
C.M.I.*	8,101.12	C.M.I.*	6,830.64
TOTAL	$32,686.82	TOTAL	$37,338.75

BADWAK, D.A.		BOWEN, D.F.	
Grand Total, 1988-1995		**Grand Total, 1988-1995**	
Amount Due	$29,535.36	Amount Due	$26,449.03
C.M.I.*	6,971.65	C.M.I.*	5,759.23
TOTAL	$36,507.01	TOTAL	$32,208.26

*Compounded Monthly Interest

BOYER, C.W.

Grand Total, 1988-1995	
Amount Due	$2,788.35
C.M.I.*	1,432.06
TOTAL	$4,220.41

BROCK

Grand Total, 1988-1995	
Amount Due	$30,581.20
C.M.I.*	6,112.17
TOTAL	$36,693.37

BROWN, D.T.

Grand Total, 1988-1995	
Amount Due	$9,139.08
C.M.I.*	4,248.84
TOTAL	$13,387.92

BURKE, A.W., SR.

Grand Total, 1988-1995	
Amount Due	$7,052.75
C.M.I.*	2,090.47
TOTAL	$9,143.22

BURKE, T.L.

Grand Total, 1988-1995	
Amount Due	$16,414.86
C.M.I.*	4,112.99
TOTAL	$20,527.85

BUTLER, T.R.

Grand Total, 1988-1995	
Amount Due	$30,236.29
C.M.I.*	6,177.21
TOTAL	$36,413.50

CHILDERS, G.S.

Grant Total, 1988-1995	
Amount Due	$24,018.18
C.M.I.*	5,001.06
TOTAL	$29,019.24

CISSNA, K.I.

Grand Total, 1988-1995	
Amount Due	$15,117.71
C.M.I.*	3,778.54
TOTAL	$18,896.25

CLARK, C.L.

Grand Total, 1988-1995	
Amount Due	$18,757.11
C.M.I.*	3,139.57
TOTAL	$21,896.68

CLAYPOOL, K.T.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

*Compounded Monthly Interest

COLELLA, R.

Grand Total, 1988-1995	
Amount Due	$7,981.59
C.M.I.*	3,211.19
TOTAL	$11,192.78

COLLISON, L.P.

Grand Total, 1988-1995	
Amount Due	$32,056.46
C.M.I.*	7,065.83
TOTAL	$39,122.29

CONNOR, M.A.

Grand Total, 1988-1995	
Amount Due	$29,206.93
C.M.I.*	4,624.30
TOTAL	$33,831.23

COOPER, W.A., JR.

Grand Total, 1988-1995	
Amount Due	$17,940.27
C.M.I.*	1,708.87
TOTAL	$19,649.14

CORBEL, R.W.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

COVINGTON, J.A.

Grand Total, 1988-1995	
Amount Due	$35,061.23
C.M.I.*	7,489.95
TOTAL	$42,551.18

COX, M.E., JR.

Grand Total, 1988-1995	
Amount Due	$32,096.12
C.M.I.*	6,752.89
TOTAL	$38,849.01

CRAWFORD, T.S.

Grand Total, 1988-1995	
Amount Due	$5,350.31
C.M.I.*	2,439.87
TOTAL	$7,790.18

CROW, T. II

Grand Total, 1988-1995	
Amount Due	$19,403.65
C.M.I.*	2,625.21
TOTAL	$22,028.86

CULLISON, R.

Grand Total, 1988-1995	
Amount Due	$14,917.96
C.M.I.*	2,943.66
TOTAL	$17,861.62

*Compounded Monthly Interest

DAVIES, R.E., JR.

Grand Total, 1988-1995	
Amount Due	$4,914.18
C.M.I.*	232.29
TOTAL	$5,146.47

DELALLA, M.

Grand Total, 1988-1995	
Amount Due	$15,619.94
C.M.I.*	4,358.85
TOTAL	$19,978.79

DENNETT, J.N.

Grand Total, 1988-1995	
Amount Due	$39,226.19
C.M.I.*	8,803.55
TOTAL	$48,029.74

DEPRIEST, D.

Grand Total, 1988-1995	
Amount Due	$17,927.12
C.M.I.*	2,483.03
TOTAL	$20,410.15

DICKEY, G.

Grand Total, 1988-1995	
Amount Due	$30,438.63
C.M.I.*	7,282.68
TOTAL	$37,721.31

DIETZ, S.

Grand Total, 1988-1995	
Amount Due	$29,482.70
C.M.I.*	7,039.80
TOTAL	$36,522.50

DIETZ, G., JR.

Grand Total, 1988-1995	
Amount Due	$29,330.07
C.M.I.*	8,404.20
TOTAL	$37,734.27

DUNHAM, A.Y.

Grand Total, 1988-1995	
Amount Due	$21,758.88
C.M.I.*	5,291.02
TOTAL	$27,049.90

EDWARDS, J.H., JR.

Grand Total, 1988-1995	
Amount Due	$5,477.92
C.M.I.*	2,661.07
TOTAL	$8,138.99

EGAN, S.E.

Grand Total, 1988-1995	
Amount Due	$20,948.34
C.M.I.*	4,275.91
TOTAL	$25,224.25

*Compounded Monthly Interest

EICENS, M.L.

Grand Total, 1988-1995

Amount Due	$1,985.14
C.M.I.*	1,000.28
TOTAL	$2,985.42

EISENHARDT, W.J.

Grand Total, 1988-1995

Amount Due	$35,314.24
C.M.I.*	8,226.73
TOTAL	$43,540.97

ESKER, E.A.

Grand Total, 1988-1995

Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

ESTEPP, K.M.

Grand Total, 1988-1995

Amount Due	$22,235.05
C.M.I.*	5,144.39
TOTAL	$27,379.44

FEILINGER, S.S.

Grand Total, 1988-1995

Amount Due	$9,595.51
C.M.I.*	2,892.30
TOTAL	$12,487.81

FINK, R., JR.

Grand Total, 1988-1995

Amount Due	$27,378.35
C.M.I.*	7,041.89
TOTAL	$34,420.24

FISHEL, D.G., JR.

Grand Total, 1988-1995

Amount Due	$13,629.83
C.M.I.*	3,766.67
TOTAL	$17,396.50

FORD, W.A., JR.

Grand Total, 1988-1995

Amount Due	$23,545.33
C.M.I.*	5,777.79
TOTAL	$29,323.12

FRITZ, B.A.

Grand Total, 1988-1995

Amount Due	$16,045.21
C.M.I.*	1,790.26
TOTAL	$17,835.47

FRYE, ST. K.

Grand Total, 1988-1995

Amount Due	$14,517.91
C.M.I.*	1,084.79
TOTAL	$15,602.70

*Compounded Monthly Interest

GERO, T.A.

Grand Total, 1988-1995	
Amount Due	$20,001.38
C.M.I.*	4,060.89
TOTAL	$24,062.27

GESLOIS, D.J.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

GLIME, J.L.

Grand Total, 1988-1995	
Amount Due	$31,869.43
C.M.I.*	6,265.15
TOTAL	$38,134.58

GOETZ, J.E.

Grand Total, 1988-1995	
Amount Due	$20,682.80
C.M.I.*	4,329.57
TOTAL	$25,012.37

GORMLEY, J.P.

Grand Total, 1988-1995	
Amount Due	$4,954.50
C.M.I.*	2,496.68
TOTAL	$7,451.18

GREENE, J.C.

Grand Total, 1988-1995	
Amount Due	$30,877.62
C.M.I.*	7,148.40
TOTAL	$38,026.02

GROTE, K.D.

Grand Total, 1988-1995	
Amount Due	$29,354.25
C.M.I.*	5,280.86
TOTAL	$34,635.11

HARRIS, R.L.

Grand Total, 1988-1995	
Amount Due	$25,259.64
C.M.I.*	6,705.00
TOTAL	$31,964.64

HARSH, R.A.

Grand Total, 1988-1995	
Amount Due	$3,810.31
C.M.I.*	1,781.09
TOTAL	$5,591.40

HARSH, J.

Grand Total, 1988-1995	
Amount Due	$7,200.29
C.M.I.*	3,359.04
TOTAL	$10,559.33

*Compounded Monthly Interest

HENRY, S.M.

Grand Total, 1988-1995	
Amount Due	$8,150.34
C.M.I.*	3,418.01
TOTAL	$11,568.35

HENRY, M.P.

Grand Total, 1988-1995	
Amount Due	$27,044.30
C.M.I.*	6,413.86
TOTAL	$33,458.16

HERZ, M.W.

Grand Total, 1988-1995	
Amount Due	$4,541.52
C.M.I.*	2,042.32
TOTAL	$6,583.84

HOUSAND, L.A.

Grand Total, 1988-1995	
Amount Due	$25,150.40
C.M.I.*	4,333.01
TOTAL	$29,483.41

HOWE, B.J.

Grand Total, 1988-1995	
Amount Due	$12,928.69
C.M.I.*	867.74
TOTAL	$13,796.43

HUBER, J.M.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

HUFFMAN, M.C.

Grand Total, 1988-1995	
Amount Due	$10,969.20
C.M.I.*	711.42
TOTAL	$11,680.62

ISENNOCK, W.W.

Grand Total, 1988-1995	
Amount Due	$28,742.24
C.M.I.*	5,927.62
TOTAL	$34,669.86

JARZYNSKI, D.L.

Grand Total, 1988-1995	
Amount Due	$29,812.96
C.M.I.*	6,952.15
TOTAL	$36,765.11

JETT, G.E.

Grand Total, 1988-1995	
Amount Due	$4,700.76
C.M.I.*	2,278.79
TOTAL	$6,979.55

*Compounded Monthly Interest

JOHNSON, R.

Grand Total, 1988-1995	
Amount Due	$29,164.58
C.M.I.*	$5,502.10
TOTAL	$34,666.68

JONES, S.E.

Grand Total, 1988-1995	
Amount Due	$17,780.38
C.M.I.*	2,621.56
TOTAL	$20,401.94

JORDAN, J.M.

Grand Total, 1988-1995	
Amount Due	$12,050.18
C.M.I.*	795.31
TOTAL	$12,845.49

JOY, R.A.

Grand Total, 1988-1995	
Amount Due	$34,730.21
C.M.I.*	6,952.79
TOTAL	$41,683.00

KIDWELL, J.L.

Grand Total, 1988-1995	
Amount Due	$13,807.68
C.M.I.*	$4,856.65
TOTAL	$18,664.33

KLINGER, D.R.

Grand Total, 1988-1995	
Amount Due	$24,028.89
C.M.I.*	3,298.63
TOTAL	$27,327.52

KOOSER, C.C.

Grand Total, 1988-1995	
Amount Due	$4,158.18
C.M.I.*	993.40
TOTAL	$5,150.58

KRUGER, J.D.

Grand Total, 1988-1995	
Amount Due	$18,660.66
C.M.I.*	4,695.99
TOTAL	$23,356.65

LEFLER, S.

Grand Total, 1988-1995	
Amount Due	$4,721.01
C.M.I.*	2,423.56
TOTAL	$7,144.57

LEFLER, K.A.

Grand Total, 1988-1995	
Amount Due	$29,948.54
C.M.I.*	6,918.63
TOTAL	$36,867.17

*Compounded Monthly Interest

LINGREN, R.J.

Grand Total, 1988-1995	
Amount Due	$15,109.97
C.M.I.*	1,433.87
TOTAL	$16,543.84

MERSON, W.L.

Grand Total, 1988-1995	
Amount Due	$18,035.43
C.M.I.*	2,906.65
TOTAL	$20,942.08

MARSHALL, D.P.

Grand Total, 1988-1995	
Amount Due	$21,315.42
C.M.I.*	3,570.99
TOTAL	$24,886.41

MIKULES, T.L.

Grand Total, 1988-1995	
Amount Due	$38,281.75
C.M.I.*	8,280.46
TOTAL	$46,562.21

MARSIGLIA, M.J.

Grand Total, 1988-1995	
Amount Due	$23,320.00
C.M.I.*	5,191.37
TOTAL	$28,511.37

MOORE, M.S.

Grand Total, 1988-1995	
Amount Due	$24,624.76
C.M.I.*	6,166.65
TOTAL	$30,791.41

MCANALLEN, J.

Grand Total, 1988-1995	
Amount Due	$2,624.26
C.M.I.*	1,343.15
TOTAL	$3,967.41

NOVAK, G.A.

Grand Total, 1988-1995	
Amount Due	$25,570.56
C.M.I.*	4,386.16
TOTAL	$29,956.72

MEAD, R.A.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

O'BRIEN, R.

Grand Total, 1988-1995	
Amount Due	$0.00
C.M.I.*	0.00
TOTAL	$0.00

*Compounded Monthly Interest

O'CONNELL, M.

Grand Total, 1988-1995	
Amount Due	$8,113.78
C.M.I.*	3,907.17
TOTAL	$12,020.95

ORYE, J.L.

Grand Total, 1988-1995	
Amount Due	$1,989.40
C.M.I.*	619.64
TOTAL	$2,609.04

PARDOE, K.

Grand Total, 1988-1995	
Amount Due	$5,988.85
C.M.I.*	2,864.13
TOTAL	$8,852.98

PEZZA, T.A.

Grand Total, 1988-1995	
Amount Due	$24,281.37
C.M.I.*	4,338.30
TOTAL	$28,619.67

PFEFFER, G.L.

Grand Total, 1988-1995	
Amount Due	$1,192.35
C.M.I.*	421.64
TOTAL	$1,613.99

PHILLIPS, W.H.

Grand Total, 1988-1995	
Amount Due	$8,015.12
C.M.I.*	1,995.01
TOTAL	$10,010.13

POPE, N.

Grand Total, 1988-1995	
Amount Due	$25,353,95
C.M.I.*	4,426.37
TOTAL	$29,780.32

PRASCHAK, M.S.

Grand Total, 1988-1995	
Amount Due	$29,548.37
C.M.I.*	$6,095.90
TOTAL	$35,644.27

PRENDERGAST, P.

Grand Total, 1988-1995	
Amount Due	$10,014.53
C.M.I.*	4,337.58
TOTAL	$14,352.11

PUGLIESE, A.J.

Grand Total, 1988-1995	
Amount Due	$3,592.70
C.M.I.*	1,863.20
TOTAL	$5,455.90

*Compounded Monthly Interest

RABINOWITZ, C.A.

Grand Total, 1988-1995

Amount Due	$10,929.30
C.M.I.*	3,798.19
TOTAL	$14,727.49

RAY, C.E.

Grand Total, 1988-1995

Amount Due	$25,233.80
C.M.I.*	4,359.55
TOTAL	$29,593.35

RITCHIE, R.D.

Grand Total, 1988-1995

Amount Due	$11,107.07
C.M.I.*	752.81
TOTAL	$11,859.88

RODRIGUEZ, D.

Grand Total, 1988-1995

Amount Due	$21,730.00
C.M.I.*	3,249.99
TOTAL	$24,979.99

ROSS, E.

Grand Total, 1988-1995

Amount Due	$8,242.21
C.M.I.*	2,173.05
TOTAL	$10,415.26

ROSTEK, J.C.

Grand Total, 1988-1995

Amount Due	$22,875.64
C.M.I.*	4,378.76
TOTAL	$27,254.40

SCHMIDT, R.J.

Grand Total, 1988-1995

Amount Due	$12,180.29
C.M.I.*	4,519.16
TOTAL	$16,699.45

SCHNEIDER, K.S.

Grand Total, 1988-1995

Amount Due	$16,512.68
C.M.I.*	2,681.45
TOTAL	$19,194.13

SCHUELER, D.

Grand Total, 1988-1995

Amount Due	$13,797.74
C.M.I.*	1,467.40
TOTAL	$15,265.14

SHANK, H.W.

Grand Total, 1988-1995

Amount Due	$31,323.38
C.M.I.*	6,822.97
TOTAL	$38,146.35

*Compounded Monthly Interest

SLEDGESKI, C.W.

Grand Total, 1988-1995

Amount Due	$8,583.32
C.M.I.*	3,726.28
TOTAL	$12,309.60

SMITH, G.L.

Grand Total, 1988-1995

Amount Due	$12,929.61
C.M.I.*	4,660.97
TOTAL	$17,590.58

SMITH, M.A.

Grand Total, 1988-1995

Amount Due	856.05
C.M.I.*	293.90
TOTAL	$1,149.95

SPIES, R.S.

Grand Total, 1988-1995

Amount Due	$25,599.74
C.M.I.*	5,201.68
TOTAL	$30,801.42

SQUILLACI, J.

Grand Total, 1988-1995

Amount Due	$8,785.13
C.M.I.*	643.70
TOTAL	$9,428.83

STAG, T.A.

Grand Total, 1988-1995

Amount Due	$6,653.33
C.M.I.*	2,074.13
TOTAL	$8,727.46

STALEY, P.G.

Grand Total, 1988-1995

Amount Due	$18,218.63
C.M.I.*	5,999.30
TOTAL	$24,217.93

STAMM, F.R.

Grand Total, 1988-1995

Amount Due	$18,446.57
C.M.I.*	6,815.25
TOTAL	$25,261.82

STARR, L.E.

Grand Total, 1988-1995

Amount Due	$16,617.37
C.M.I.*	5,357.57
TOTAL	$21,974.94

STERLING, D.M.

Grand Total, 1988-1995

Amount Due	$25,096.19
C.M.I.*	8,581.66
TOTAL	$33,677.85

*Compounded Monthly Interest

SWAIN, M.L.

Grand Total, 1988-1995	
Amount Due	$15,700.10
C.M.I.*	3,634,70
TOTAL	$19,334.80

SWINDLE, K.D.

Grand Total, 1988-1995	
Amount Due	$33,616.25
C.M.I.*	7,820.87
TOTAL	$41,437.12

THOMPSON, S.

Grand Total, 1988-1995	
Amount Due	$33,027.96
C.M.I.*	7,599.14
TOTAL	$40,627.10

TUCKER, T.A.

Grand Total, 1988-1995	
Amount Due	$15,312.30
C.M.I.*	4,562.62
TOTAL	$19,874.92

VACCARO, R.T.

Grand Total, 1988-1995	
Amount Due	$24,704.19
C.M.I.*	4,356.56
TOTAL	$29,060.75

VALDERAS, R.M.

Grand Total, 1988-1995	
Amount Due	$29,258.10
C.M.I.*	6,855.74
TOTAL	$36,113.84

WALLACE, M.D.

Grand Total, 1988-1995	
Amount Due	$8,526.48
C.M.I.*	2,967.56
TOTAL	$11,494.04

WARD, W.M.

Grand Total, 1988-1995	
Amount Due	$31,451.04
C.M.I.*	7,053.12
TOTAL	$38,504.16

WEIGEL, D.

Grand Total, 1988-1995	
Amount Due	$10,162.25
C.M.I.*	643.88
TOTAL	$10,806.13

WELLMAN, J.B.

Grand Total, 1988-1995	
Amount Due	$2,521.87
C.M.I.*	1,226.88
TOTAL	$3,748.75

*Compounded Monthly Interest

WEST, J.D.

Grand Total, 1988-1995	
Amount Due	$32,231.05
C.M.I.*	6,923,16
TOTAL	$39,154.21

WILLIAMS, D.K.

Grand Total, 1988-1995	
Amount Due	$23,871.32
C.M.I.*	5,571.04
TOTAL	$29,442.36

WILDT, K.E.

Grand Total, 1988-1995	
Amount Due	$5,656.82
C.M.I.*	2,157.94
TOTAL	$7,814.76

YETTER, C.E.

Grand Total, 1988-1995	
Amount Due	$14,117.69
C.M.I.*	1,718.48
TOTAL	$15,836.17

WILHELM, W.M.

Grand Total, 1988-1995	
Amount Due	$35,632.03
C.M.I.*	8,187.53
TOTAL	$43,819.56

GRAND TOTALS:

Amount Due	$2,369,227.96
Compounded Monthly Interest	537,975.67
TOTAL	$2,907,203.63

*Compounded Monthly Interest

APPENDIX D

PUBLISHED

[137 F.3d 752 (4th Cir. 1998)]

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 96-1251

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARYZNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE

L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Defendant-Appellant,

CITY OF BALTIMORE, MARYLAND,

Amicus Curiae.

No. 96-1280

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARYZNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL

STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR., CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Defendant-Appellant,

CITY OF BALTIMORE, MARYLAND,

Amicus Curiae.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-90-2281-B)

Argued: December 1, 1997

Decided: February 18, 1998

Before WILKINSON, Chief Judge, HAMILTON, Circuit Judge, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed in part and reversed in part by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Hamilton and Judge Norton joined.

COUNSEL

ARGUED: Gail Thuman Watson, Assistant County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellant. John D. Maddox, ARTER & HADDEN, Washington, D.C., for Amicus Curiae. Francis Joseph Collins, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellees. Steph-

anie Robin Marcus, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. **ON BRIEF**: David A. Plymyer, Deputy County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellant. Thomas H. Odom, Terri L. Bowman, ARTER & HADDEN, Washington, D.C.; Otho M. Thompson, City Solicitor, James S. Ruckle, Jr., Associate City Solicitor, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for Amicus Curiae. Joel A. Smith, Andrew H. Kahn, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland; Laurence Gold, Washington, D.C., for Appellees. Frank W. Hunger, Assistant Attorney General, Lynne Ann Battaglia, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

OPINION

Wilkinson, Chief Judge:

Following the Supreme Court's decision in *Printz v. United States*, 117 S. Ct. 2365 (1997), this court requested supplemental briefing on the following question: "In light of the Supreme Court's decision in *Printz v. United States*, 65 U.S.L.W. 4731 (June 27, 1997), whether the Fair Labor Standards Act may be constitutionally applied to the salary determinations at issue in this case." The parties briefed and argued the constitutionality of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201 *et seq.*, as applied to state and local governments. Anne Arundel County argued vigorously that the present Supreme Court would hold the FLSA violative of the Tenth Amendment as it applies to state and local government employees. Our task, however, is not

to predict what the Supreme Court might do but rather to follow what it has done. In light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), we must uphold the constitutionality of applying the FLSA to Anne Arundel County in this case.

With respect to the merits of plaintiffs' FLSA claims, we affirm in part and reverse in part the judgment of the district court.

I.

John West and his fellow plaintiffs are current or former employees of the Anne Arundel County Fire Department. They are known as Emergency Medical Technicians, or EMTs. Between 1987 and 1995, each was assigned to the Fire Department's Emergency Medical Services (EMS) Division in the job classification of Firefighter/Emergency Medical Technician-Ambulance, Firefighter/Cardiac Rescue Technician, or Firefighter/Emergency Medical Technician-Paramedic.

Like all County firefighters, the EMTs completed a twenty-one-week Fire Academy, which included training in all aspects of the Department's emergency service work – firefighting, emergency medical services, rescue, and hazardous materials operations. Once they were assigned to the EMS Division, plaintiffs worked the same shift schedule and were integrated into the same command structure as other firefighters. When responding to a call, however, EMTs were generally prohibited from active participation in fire suppression in order to keep clean for their medical duties.

The employment relationship between the Fire Department and all firefighters, including EMS personnel, was governed by the same union contract. Firefighters and

EMTs were compensated for overtime hours according to the partial exemption for fire protection and law enforcement employees in section 7(k) of the FLSA, 29 U.S.C. §207(k), rather than the general forty-hour standard set forth in section 7(a) of the FLSA, 29 U.S.C. §207(a).

Plaintiff EMTs filed suit challenging their classification as fire protection employees and seeking lost overtime pay, liquidated damages, prejudgment interest, and attorney's fees. The district court granted plaintiffs summary judgment, finding that they did not fall under the section 7(k) exemption. The court rejected the County's argument that plaintiffs who had been Captains, Field Lieutenants, Training Lieutenants, or Paramedics were exempt from overtime requirements as "bona fide executive, administrative, or professional" personnel. *See* 29 U.S.C. §213(a)(1). And the court denied the County's defense of good faith under 29 U.S.C. §259(a). Plaintiffs were awarded prejudgment interest but no liquidated damages, and the court applied a two-year statute of limitations to their claims. Both parties appeal.[1]

II.

A.

In this case we are asked to apply the FLSA to a subdivision of state government. For some years following the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (subjecting a local government to the FLSA), such application was constitutionally uncontroverted. In a recent line of cases culminating in *Printz v. United States*, 117 S. Ct. 2365 (1997), however, the Supreme Court has

[1]The County does not appeal the district court's decision with respect to Paramedics.

imposed limits, either through the Commerce Clause or the Tenth and Eleventh Amendments, on the power of Congress to enact legislation that affects state and local governments. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Tenth Amendment) (*New York II*); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment). In view of the strong commitment to state sovereignty evidenced in this series of cases, this court ordered supplemental briefing and heard argument from the parties on the question whether the FLSA could constitutionally be applied to determine wages and working conditions for critical components of the state and local workforce.

The County, joined by amicus City of Baltimore, advances three main arguments against applying the FLSA to state governmental entities.[2] First, the County contends that state governments should be able to set the wages and working conditions of their own employees. Even if one does not accept this broad and bright-line formulation, however, the County reads *Printz* to prohibit federal regulation of any activity of state government that can be said to be a core governmental function. Any definition of core governmental function, argues the County, would, at a minimum, include the emergency public safety services provided by the Fire Department.

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[2]Hereafter we will use the word "state" to include local governments. For purposes of determining whether a governmental entity is protected by constitutional guarantees of federalism, including the Tenth Amendment, the law does not distinguish between states and their political subdivisions. That "distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity." *Printz*, 117 S.Ct. at 2382 n.15 (citation omitted).

According to the County, *Printz* breathed new life into the principle of federalism underlying the Tenth Amendment and revived the "traditional governmental function" analysis employed before *Garcia* in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The County thus interprets *Printz* to invalidate congressional enactments like the FLSA that "compromise the structural framework of dual sovereignty" by regulating a quintessential government function such as firefighting, no matter what form the law takes – whether it explicitly "direct[s] the functioning" of state governments or is a "law of general applicability" the incidental application of which "excessively interfere[s] with the functioning of state governments." *See Printz*, 117 S. Ct. at 2383.

The County also equates the 1974 FLSA Amendments with the Brady Handgun Violence Prevention Act invalidated in *Printz*. Both laws are said impermissibly to "commandeer" or "conscript" state government processes by forcing them to conform to and serve a federal mandate. *See, e.g., id.* at 2381; *New York II*, 505 U.S. at 175, 178. The relevant provisions of the 1974 Amendments targeted only state governmental entities; thus, says the County, the Amendments constitute direct regulation of states as states. The County further contends that the financial burden of compliance with the FLSA would require a wholesale restructuring and/or reduction of the services provided by the Fire Department. The arcane and impenetrable nature of FLSA regulations, says the County, only adds to the level of federal intrusiveness. By thus dictating the organization and operation of a local fire department, the County claims the FLSA effectively directs the functioning of this governmental unit and transgresses *Printz*'s ban on federal conscription of state governments.

Finally, the County deems the FLSA unconstitutional even if it is seen as a law of general applicability that regulates states only incidentally. According to the County's interpretation of *Printz*, the constitutionality of such laws turns on a "balancing test" like that in *Fry v. United States*, 421 U.S. 542 (1975), *National League of Cities*, 426 U.S. 833 (1976), and *South Carolina v. Baker*, 485 U.S. 505 (1988), which weighs the seriousness of the problem addressed by the federal law against the effect on state sovereignty of compliance with it. The County concludes that the FLSA is unconstitutional as applied to the Fire Department because it fails this test. According to the County, the FLSA aims to remedy substandard labor conditions and encourage the spread of employment. The County sees these objectives as meaningless in the context of the Fire Department, where employees are adequately represented by a union and the amount of employment is controlled by a "tax-cap" limit on supply and unpredictable demand that is indexed to the rate of accidents. Weighed against the uncertain or negligible benefit of regulation, the County claims that the serious impact of FLSA compliance on the structure and size of the Fire Department constitutes excessive interference with state sovereignty.

Plaintiffs, joined by the United States as intervenor, insist that the FLSA may constitutionally be applied in this case. They deride the County's proposed "traditional governmental function" analysis as unworkable. The Supreme Court unanimously abandoned a similar "untenable" standard in the area of intergovernmental tax immunity. *See New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590-96 (Douglas,

J., dissenting, joined by Black, J.) (*New York I*). And plaintiffs point out that as recently as last term the Court refused to grant immunity from suit under 42 U.S.C. §1983 for private sector employees performing a "governmental" function on grounds that "a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities." *Richardson v. McKnight*, 117 S. Ct. 2100, 2106 (1997). Thus, even in light of *Printz*, plaintiffs see no reason to expect the Supreme Court to depart from its conclusion in *Garcia* "that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism." 469 U.S. at 531.

Plaintiffs also dispute the County's attempt to locate the 1974 FLSA Amendments in the line of Tenth Amendment cases concerning federal laws that commandeer state government. Plaintiffs argue that the 1974 Amendments simply do not fit the category of conscriptive legislation. First, they point out that cases in this line of authority have considered federal laws that impress state officials to enact or administer a federally-conceived regulatory program. *See, e.g., Printz*, 117 S. Ct. at 2380-84 (invalidating background check obligation imposed by Brady Act on state law enforcement personnel because it impermissibly "dragooned" them "into administering federal law") (citation omitted); *New York II*, 505 U.S. at 162 (invalidating congressional attempt "to require the States to govern according to Congress' instructions"). Plaintiffs maintain that the FLSA does not come close to having this effect. They deny that the FLSA actually regulates the structure or functioning of the Fire Department, insisting that the FLSA allows the Department to reach whatever salary and scheduling arrangement for

EMTs and firefighters it wants, within broad statutory parameters. Plaintiffs thus conclude that, because the County remains free to structure the provision of fire and rescue services however it sees fit, the County government has not in fact been "commandeered."

Rather, according to plaintiffs, the 1974 Amendments are part of a conceptually distinct category: laws of general applicability that incidentally apply to state governments. Plaintiffs insist that *Printz* had no effect on such general regulation, noting that in *Printz*, as it had in *New York II*, the Supreme Court consciously maintained the long-standing distinction between general legislation that incidentally affects states and targeted legislation that conscripts the processes of state government. *Printz*, 117 S. Ct. at 2383; *New York II*, 505 U.S. at 160-61 ("[T]his is not a case in which Congress has subjected a State to the same legislation applicable to private parties. This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation, that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.") (citations omitted). Plaintiffs point to *Garcia* as the controlling authority in the former line of cases, where the Supreme Court explicitly approved applying the FLSA to a governmental entity despite federalism objections. *See* 469 U.S. at 555-56. Further, plaintiffs contend that, to the extent *Printz* mandates a balancing test to determine the constitutionality of applying such general regulation to states, *Garcia* has already struck the balance with respect to the FLSA and deemed it a permissible regulation of state employment.

B.

The parties have thus ably joined issue on the critical constitutional issue in this case. Their respective conten-

tions demonstrate two things: (1) that the Court in *Printz* has generally stressed the importance of the Tenth Amendment in our constitutional system; and (2) that neither *Printz* nor any other Supreme Court case has specifically overruled *Garcia*. In the end, therefore, we conclude both that *Garcia* controls the disposition of that issue and that any decision to revisit *Garcia* is not ours to make. In a case decided the same term as *Printz*, the Supreme Court did not move to reconsider *Garcia* and enforced the FLSA against a local government agency without addressing the constitutional question. *Auer v. Robbins*, 117 S. Ct. 905, 909 (1997). Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent. *E.g., Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997). The Supreme Court's direction has been crystal clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That apparently is the situation here: *Garcia* is specifically on point; *Printz*'s contrary intimations are only generally instructive. We thus conclude on the authority of *Garcia* that the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect.

III.

We next turn to the merits of the parties' FLSA claims. Section 7(a) of the FLSA mandates overtime compensation at a rate of one and one-half times the regular hourly rate for every hour worked in excess of forty per workweek. 29 U.S.C. §207(a). Section 7(k) outlines a special overtime system for employees of public agencies engaged

in fire protection or law enforcement activities. As construed by the Department of Labor, this section mandates that time-and-a-half be paid to fire protection workers for every hour worked in excess of fifty-three per workweek. 29 U.S.C. §207(k); 29 C.F.R. §553.230. The County claims that plaintiffs engage in "fire protection activities" and thus fit within the section 7(k) exemption from the FLSA's overtime requirements. Like the district court, we disagree.

The County relies on the regulatory definition of "fire protection activities," which "include[s] rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. §553.210. The County asserts that plaintiffs are such "an integral part" of the Department's fire protection activities: EMTs function together with firefighters in a unified command structure, receive fire academy training, share union representation with firefighters, work at the same facilities and towards a common goal with firefighters, and operate under a system of coresponding to all calls the Department receives.

The County, however, has not shown that EMTs' activities integrally relate to the Fire Department's fire protection activities. Further, we agree with plaintiffs that 29 C.F.R. §553.212(a) directs the conclusion that EMTs are not employees engaged in "fire protection activities." This regulation plainly imposes an across-the-board limitation on the amount of non-fire-fighting work that employees may perform and still qualify as fire protection employees under 29 U.S.C. §207(k):

> Employees engaged in fire protection or law enforcement activities as described in §§553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in

> conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. *A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.*

29 C.F.R. §553.212 (emphasis added). Plaintiffs do not qualify as fire protection employees because they exceed this twenty percent limit. EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters. In an affidavit, the named plaintiff, John West, indicates that his job typically consists of

> preparing for medical emergencies, traveling to medical emergencies, stocking the ambulance or emergency medical vehicle, administering first aid and other medical care in emergency medical situations, transporting patients to hospitals, cleaning and maintaining the ambulance and station, attending training sessions, studying emergency medical procedures and waiting to be called on emergency medical calls.

The record shows that, during the period at issue in this lawsuit, at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all. Medical services which are not rendered at the scene of any fire do not qualify as exempt activities. *Id.* (exempt work must be "performed as an incident to or in conjunction with" fire protection activities); *see also id.* §553.210(a)(4) (defining fire protection activities as those activities "directly con-

cerned" with "the prevention, control or extinguishment of fires"). Moreover, when the Fire Department did respond to a fire call, EMTs were prohibited by standard operating procedure from engaging in fire suppression activities. In light of this evidence that plaintiff EMTs generally did not – and could not – fight fires, it cannot be said that "fire protection activities" comprised more than eighty percent of their work. Thus, we find that the County violated the FLSA when it subjected plaintiffs to the special overtime standard for fire protection employees.

IV.

Next we turn to the County's claim that plaintiffs ranked as Captains or Lieutenants are exempt from overtime as employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). FLSA section 13(a) indicates that the statute's overtime provisions "shall not apply" to such employees. *Id.* §213(a). It is clear that all plaintiffs were paid more than $250.00 each week, so we apply the regulatory "short test" to the County's submissions. *See* 29 C.F.R. §§541.1 & 541.2.

A.

First, the County claims that plaintiffs employed in the positions of EMS Captain-Operations, EMS Captain-Training Coordinator, and EMS Captain-Duty Officer ("Captains") are not entitled to overtime pay because they qualify as executives.[3] In order to fit this exemp-

[3]Throughout this litigation Captains have been treated as a group, and neither party attempts to draw any meaningful distinction between them with respect to their duties or salary status.

tion, an employee must be "compensated on a salary basis," and most of his duties must involve management. *Id.* §541.1(f). We agree with the County that Captains satisfy both the salary test and the duties test for the executive exemption.

An individual is employed on a salary basis "if under his employment agreement he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* §541.118(a). Plaintiffs receive a minimum predetermined amount every two weeks, plus additional compensation in the form of overtime. They are paid for 50 hours of work each week, even if they only work 48 hours. Plaintiffs thus appear to be employed on a salary basis. Additional compensation does not alter the status of salaried employees, *id.* §541.118(b), so the receipt of overtime does not defeat the salary basis of plaintiffs' employment. *York v. City of Wichita Falls,* 944 F.2d 236, 242 (5th Cir. 1991); *Hartman v. Arlington Cty.,* 720 F. Supp. 1227 (E.D. Va 1989), *aff'd on reasoning of lower court,* 903 F.2d 290 (4th Cir. 1990).

Plaintiffs claim that Captains are "subject to" two reductions in pay that defeat salary basis: reductions for minor disciplinary infractions and reductions for partial-day absences. FLSA regulations provide that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status," implying that reductions in pay for lesser disciplinary violations do defeat the salary basis of employment. 29 C.F.R. §541.118(a)(5); *accord Auer,* 117 S. Ct. at 909; *Shockley v. City of Newport News,* 997 F.2d 18, 24-25 (4th Cir. 1993). And under regula-

tions in effect during the period in question in this case, reductions in pay for absences of less than a day would defeat salary basis.[4] *See* 57 Fed. Reg. 37,666 (1992); *Shockley*, 997 F.2d at 22. Plaintiffs aver that all Fire Department employees are subject to these impermissible deductions and conclude from this assertion that all plaintiffs, including Captains, are not salaried. The County responds with the testimony of Stephen Halford, Deputy Chief of Administration for the Fire Department, that there has been no occasion when a Captain has actually suffered such a deduction.

At the time of trial, the courts of appeals were divided on the question of whether merely being subject to impermissible reductions, even if a deduction is never exacted, defeats salary basis. *Compare, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir 1993) (holding that if an employee's pay can theoretically be docked, that employee is "subject to deduction" within the meaning of 29 C.F.R. §541.118(a) and thus is not salaried), *with, e.g., Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (holding that employee loses salaried status only if their pay is actually docked). However, during the pendency of this appeal, the Supreme Court resolved this circuit split. *See Auer*, 117 S. Ct. at 910-11. The Supreme Court interpreted the FLSA regulations to mean that employees lose salaried status if they "are

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[4] We note that "[t]he Department of Labor created an exception to this principle on September 6, 1991, when it promulgated 29 C.F.R. §541.5d. . . . Therefore, to the extend that [County] policy in fact required such reductions, the policy only affects whether [Captains] were paid on a salary basis prior to September 6, 1991." *Shockley*, 997 F.2d at 22 (citations and footnote omitted).

covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.' " *Id.* at 911 (quoting Secretary of Labor's brief as amicus curiae). "That standard is met . . . if there is either [1] an actual practice of making such deductions or [2] an employment policy that creates a 'significant likelihood' of such deductions." *Id.*

Because "an appellate court must apply the law in effect at the time it renders its decision," *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969), we use the standard adopted in *Auer*. In light of the evidence that no Captain has ever suffered a deduction in pay for either a minor disciplinary infraction or a partial-day absence, the first condition is not satisfied – the Fire Department clearly has no "actual practice" of such deductions. And the Supreme Court's reasoning in *Auer* shows that the second condition is also not met here. Because the disciplinary policy at issue in *Auer* governed all employees alike, salaried and nonsalaried, it did not "effectively communicate" a "significant likelihood" of disciplinary pay deductions for salaried employees. 117 S. Ct. at 911. Likewise in the instant case, plaintiffs themselves assert that Lieutenants and Captains "are subject to the same disciplinary rules and regulations and are subject to the same potential disciplinary measures" as other employees. Thus, as in *Auer*, this general policy does not defeat salary basis. *Id.*; *accord Stanley v. City of Tracy*, 120 F.3d 179, 184 (9th Cir. 1997); *Balgowan v. New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997).

FLSA regulations also require that the "primary duty" of an executive (1) consist of "the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof," and (2) "includes the customary and regular direc-

tion of the work of two or more other employees therein." 29 C.F.R. §541.1(f). We agree with the district court that Captains meet these requirements. "As a 'rule of thumb,' " for tasks to constitute an employee's primary duty, "the employee must devote more than fifty percent of his time to these duties." *Shockley*, 997 F.2d at 26; *see also* 29 C.F.R. §§541.103 & 541.206(b). The district court's conclusion that "Captains spend almost all of their time managing personnel, evaluating personnel performance, attending management meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates" is amply supported by the descriptions of the Captains' positions in the record. And in performing their jobs, Captains customarily supervise either one fire station or an entire shift of officers. A station or a shift constitutes a recognized department or subdivision of the Fire Department and is comprised of many more than the regulatory minimum of "two or more other employees." Thus, we find that all Captains qualify for the executive exemption from overtime pay.

B.

The County further claims that Field Lieutenants are exempt from overtime as executives. We agree. All employees of the Fire Department are subject to the same generally applicable policy of deductions, and there is no evidence that any impermissible deductions have actually been exacted from any Lieutenant's salary. Thus, applying the reasoning of *Auer*, we conclude that, like Captains, Field Lieutenants are paid on a salary basis.

Turning to the duties component of the executive exemption, we hold that the primary duty of Field Lieu-

tenants is management of a recognized department or subdivision of the Fire Department and that they customarily and regularly direct the work of two or more employees. *See* 29 C.F.R. §541.1(f). Field Lieutenants manage and direct the operations of all shifts of an EMS company, which, as noted above, constitute recognized subdivisions of the Fire Department. Field Lieutenants devote the majority of their time to management: they coordinate and implement EMS training programs at the company level; maintain company payroll and personnel leave records; enforce departmental rules and regulations; ensure operational readiness through supervision and inspection of personnel, equipment, and quarters; evaluate and test subordinates; and report and make recommendations on equipment and procedures. During the course of these activities, they supervise the work of two or more employees.

This evidence of Field Lieutenants' management responsibilities notwithstanding, the district court concluded that Field Lieutenants are best classified as "working foremen" under 29 C.F.R. §541.115, rather than exempt executives, because they supervise EMS operations in the field. We disagree. Here, as in *Shockley*, the Field Lieutenants' responsibilities extend beyond mere field supervision "to the evaluation of the subordinates and to the management of both the people and equipment assigned to their units." 997 F.2d at 27. Under *Shockley*, therefore, the working foreman concept does not apply.

C.

The County seeks the benefit of the exemption for administrative employees for plaintiffs employed as EMS Training Lieutenants. Training Lieutenants meet the cri-

teria for this exemption. As with Captains and Field Lieutenants, Training Lieutenants are paid on a salary basis as that term is interpreted in *Auer*. The administrative duties test is satisfied if (1) the employee's primary duty consists of "office or nonmanual work directly related to management policies or general business operations of his employer," 29 C.F.R. §541.2(a)(1), and (2) this duty "includes work requiring the exercise of discretion and independent judgment," *id.* §541.2(e)(2). The district court found that

> the EMS Training Lieutenant develops, coordinates, implements and conducts EMS training programs. The Lieutenant also prepares lesson plans and training aids, supervises delivery of training and tests and evaluates new equipment. It is further undisputed that the EMS Training Lieutenant spends more than 50 percent of his time on administrative duties.

The district court properly concluded that Training Lieutenants' duties "are directly related to the operation of the EMS [D]ivision" and are "essential to the management of the Fire Department." Thus, the primary duties of Training Lieutenants are indisputably "office or nonmanual work directly related to management policies or general business operations" of the Fire Department. *See* 29 C.F.R. §§541.2 & 541.206(b).

Nonetheless, the district court declined to apply the administrative exemption from overtime to Training Lieutenants, finding that there was insufficient evidence that these employees' responsibilities include "work requiring the exercise of discretion and independent judgment." *See* 29 C.F.R. §541.2(e)(2). We disagree. The regulations indicate that "the exercise of discretion and independent judgment involves the comparison and the

evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. §541.207(a). It is apparent that the primary tasks of Training Lieutenants necessitate the exercise of precisely such judgment and discretion. These primary tasks include not only developing and coordinating all EMS training programs but also administering tests and evaluating new equipment. The fact that some recommendations made by Training Lieutenants are subject to review by superior officers is no bar to application of the administrative exemption. 29 C.F.R. §541.207(e)(1). Therefore, we find that Training Lieutenants satisfy the criteria for the administrative exemption from overtime.

V.

As the record contains no evidence that the County's failure to properly administer its overtime pay system stemmed from wilful noncompliance with the FLSA, we affirm the district court's decision to apply a two-year rather than a three-year statute of limitations to plaintiffs' claims, and we uphold as well the trial court's refusal to award liquidated damages. At the same time, the County's noncompliance with the FLSA does not entitle it to invoke the defense of good faith conformity provided in the Portal-to-Portal Act, 29 U.S.C. §259(a).[5] As the district court noted, the Department of Labor Letter Ruling that the County says supports its treatment of EMTs provides no basis for determining whether the County's situation is similar to the employer to whom the letter was addressed. And, as the district court also

[5]We also affirm the district court's award of prejudgment interest to plaintiffs.

noted, "there is no evidence whatsoever that the County acted in reliance on any of the letter rulings cited."

VI.

We reverse the district court with respect to Captains, Field Lieutenants, and Training Lieutenants, finding that they satisfy both the salary test and the duties tests for the exemption from overtime for executive and administrative personnel. In all other respects, we affirm the judgment of the district court. We remand this case for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED May 13, 1998

No. 96-1251
CA-90-2281-B

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR; MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; ~~SHARON M. HENRY; MICHAEZ~~ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARZYNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE

L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE, JOHN G. ALEXANDER; STEVEN P. AMBROZEWICZ; DAVID A. BADWAK; DOUGLAS G. BOSLEY; DANIEL F. BOWEN; CLAUDIA L. CLARK; KENNETH T. CLAYPOOL; RANDALL W. CORBEL; JOHN A. COVINGTON; JOHN N. DENNETT; DANIEL J. DEPRIEST, JR.; GEORGE F. DICKEY, JR.; STEPHANIE DIETZ;

SUSAN E. EGAN; S. S. FEILINGER; ROLAND K. FINK, JR.; WALTER A. FORD, JR.; J. HARSH; MICHAEL P. HENRY; J. L. KIDWELL; S. LEFLER; KEITH A. LEFLER; J. MCANALLEN; ROBERT O'BRIEN; MICHAEL F.X. O'CONNELL, JR.; JEFFREY L. ORYE; KENNETH L. PARDOE; THOMAS A. PEZZA, JR.; A. J. PUGLIESE; EDWARD J. ROSS, III;

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor

v.

ANNE ARUNDEL COUNTY, MARYLAND

Defendant-Appellant

CITY OF BALTIMORE, MARYLAND

Amicus Curiae

No. 96-1280
CA-90-2281-B

JOHN D. WEST, on behalf of himself and all other employees of Anne Arundel County Maryland similarly situated, et al; MARIANNE C. ANDERSON; MICHAEL C. ANDRESKY; SUSAN L. BAILEY; BRIAN L. BOND; CHARLES W. BOYER; RICHARD A. BROCK; DANIEL BROWN; ANTHONY W. BURKE, SR.; TRACY L. BURKE; GUY STEVEN CHILDERS; KIM J. CISSNA; RICCARDO COLELLA; LARRY P. COLLISON; MICHAEL ALBERT CONNOR;

MICHAEL E. COX, JR.; TIMOTHY CRAWFORD; ARNITA Y. DUNHAM; MICHELE DELALLA; GRAFTON G. DEITZ, JR.; JAMES H. EDWARDS, JR.; MARA L. EICENS; WAYNE EISENHARDT; KAREN ESTEPP; DOUGLAS G. FISHEL, JR.; TERRY A. GERO; JAMES L. GLIME; JAMES E. GOETZ; JEFFREY P. GORMLEY; JOHN GREENE; KATHLEEN D. GROTE; RUSSELL LLOYD HARRIS; SHARON M. HENRY; MICHAEZ WILLIAM HERZ; LISA A. HOUSAND; JOSEPH M. HUBER; WILLIAM W. ISENNOCK; DANIEL L. JARZYNSKI; C. EDWARD JETT; ROBERT FREDERICK JOHNSON; STEPHEN E. JONES; RICHARD ALLEN JOY; CLIFFORD C. KOOSER, II; JAMES DAVID KRUGER; DOUGLAS P. MARSHALL; MICHAEL J. MARSIGLIA; WILLIAM L. MERSON; TIMOTHY L. MIKULES; MICHAEL STEVEN MOORE, JR.; GREG A. NOVAK; GEORGE L. PFEFFER, JR.; NOLDON POPE; MARK STEVEN PRASCHAK; PATRICK O. PRENDERGAST; CAROL ANN RABINOWITZ; CYNTHIA E. RAY; HURSHEL W. SHANK, JR.; CECILIA W. SLEDGESKI; GREGORY LEE SMITH, III; RANDOLPH S. SPIES; THOMAS STAG; PETER G. STALEY; LOGAN STARR, SR.; FRANK R. STAMM; DAVID STERLING; MICHAEL SWAIN; KEITH D. SWINDLE; JOHN STEVEN THOMPSON; TIMOTHY ALDYN TUCKER; ROBERT T. VACCARO, JR.; ROBERT VALDERAS; MARCUS D. WALLACE; WILLIAM H. WARD; KHRIS EDWIN WILDT; WILLIAM MARK WILHELM; DAVID K. WILLIAMS; RAYMOND J. SCHMIDT; KIMBERLY S. SCHNEIDER; MICHAEL ANDREW SMITH; JOHN B. WELLMAN; ROBERT A. HARSH; ROBERT ANTHONY MEAD; JAMES CARROLL ROSTEK, SR.; RAND J. LINDGREN; RAYMOND GENE CULLISON, JR.; DAWN RODRIGUEZ; DAVID R. KLINGER; WILLIAM

H. PHILLIPS; BRUCE E. FRITZ; CHARLES EDWARD YETTER; R. THOMAS CROW, II; DEBBIE SCHUELER; WILLIAM A. COOPER, JR.; STEVEN K. FRYE; MICHAEL C. HUFFMAN; JOSEPH M. JORDAN; DAVID JAMES GESLOIS; RUSSELL E. DAVIES, JR.; ERICK A. ESKER; DONALD WEIGEL; RALPH DAVID RITCHIE; KENNETH S. BANKE; JEANNIE SQUILLACI; HARRY JOSEPH JOYAVE; MICHAEL B. LADD; WILLIAM L. BETHEA, III; JOHN E. LAMB; DANIEL T. WOOLSTON; PATRICK J. CARMODY; CLARENCE GERALD HAYES; BRETT J. HOWE, JOHN G. ALEXANDER; STEVEN P. AMBROZEWICZ; DAVID A. BADWAK; DOUGLAS G. BOSLEY; DANIEL F. BOWEN; CLAUDIA L. CLARK; KENNETH T. CLAYPOOL; RANDALL W. CORBEL; JOHN A. COVINGTON; JOHN N. DENNETT; DANIEL J. DEPRIEST, JR.; GEORGE F. DICKEY, JR.; STEPHANIE DIETZ; SUSAN E. EGAN; S. S. FEILINGER; ROLAND K. FINK, JR.; WALTER A. FORD, JR.; J. HARSH; MICHAEL P. HENRY; J. L. KIDWELL; S. LEFLER; KEITH A. LEFLER; J. MCANALLEN; ROBERT O'BRIEN; MICHAEL F.X. O'CONNELL, JR.; JEFFREY L. ORYE; KENNETH L. PARDOE; THOMAS A. PEZZA, JR.; A. J. PUGLIESE; EDWARD J. ROSS, III;

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor

v.

ANNE ARUNDEL COUNTY, MARYLAND

Defendant-Appellee

CITY OF BALTIMORE, MARYLAND

Amicus Curiae

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Appellant cross-appellee filed petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX F

PERTINENT REGULATIONS

CODE OF FEDERAL REGULATIONS
TITLE 29 – LABOR
SUBTITLE B – REGULATIONS RELATING TO LABOR
CHAPTER V – WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER A – REGULATIONS
PART 553 – APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE
AND LOCAL GOVERNMENTS
SUBPART C – FIRE PROTECTION AND LAW ENFORCEMENT EMPLOYEES OF PUBLIC AGENCIES
EXEMPTION REQUIREMENTS

§553.210 Fire protection activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing,

attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, batallion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as maintenance and office personnel who do not fight fires on a regular basis. It may include such employees during emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this sec-

tion. Additionally, for those persons who actually engage in those fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

* * *

§553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in §§553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. (See §553.30.) The performance of such work does not affect the application of the section 13(b)(20) or 7(k) exemptions with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

* * *

§553.215 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered and nonexempt employees. This would include, for example, employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

APPENDIX G

PERTINENT COUNTY CHARTER PROVISIONS PREAMBLE; SECTION 101; SECTION 547

PREAMBLE:

We, the People of Anne Arundel County, State of Maryland, in order to form a more orderly County government, establish separate legislative and executive branches, insure responsibility of and accountability for public funds, promote the general welfare and secure the benefits of home rule, do, in accordance with the Constitution and the laws of the State of Maryland, adopt, ordain and establish as our Charter and form of government this CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND.

SECTION 101:

Anne Arundel County as it now exists constitutes a body corporate and politic. Under this Charter it shall have all rights and powers of local self-government and home rule as are now or may hereafter be provided or necessarily implied by this Charter and by the Constitution and laws of the State of Maryland.

SECTION 547. Functions and duties of the Fire Department.

The Fire Department shall be responsible for the administration of the affairs of the County in fire suppression, fire prevention, fire training, fire communications, emergency medical services, and any other duty as may be assigned by the County Executive or by law from time to time. Nothing herein shall permit the Fire Administrator to participate in the corporate affairs of any volunteer fire company.

(4)

No. 98-266

In the

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,

v.

JOHN WEST, *et al.*,

and

UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN WEST, *et al.*,

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31 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act § 7(k) partial overtime exemption for "employee[s] in fire protection activities" applies to emergency medical technicians who, on the undisputed facts as found by the lower courts, "perform mostly medical services and work related to medical services" in situations that "did not involve fire suppression at all"?

2. Should the Court reconsider and overrule its decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) holding that Congress acted constitutionally in extending the Fair Labor Standards Act – a federal law of general application – to the States and localities?

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BRIEF IN OPPOSITION FOR RESPONDENTS, JOHN WEST, *et al.*

COUNTER STATEMENT OF THE CASE

This is a Fair Labor Standards Act (FLSA) "overtime pay" case. The plaintiffs (and respondents in this Court) are "current or former employees of the Anne Arundel County Fire Department ... known as Emergency Medical Technicians or EMT's." Pet. App. 81a. The defendant (and petitioner in this Court) is Anne Arundel County, Maryland.

The crux of this case, as the Court of Appeals stated it, is this:

> EMTs were compensated for overtime hours according to the partial exemption for fire protection and law enforcement employees in section 7(k) of the FLSA, 29 U.S.C. §207(k), rather than the general forty-hour standard set forth in section 7(a) of the FLSA, 29 U.S.C. §207(a).
>
> Plaintiff EMTs filed suit challenging their classification as fire protection employees and seeking lost overtime pay, liquidated damages, prejudgment interest, and attorney's fees. The district court granted plaintiffs summary judgment, finding that they did not fall under the section 7(k) exemption ... Plaintiffs were awarded prejudgment interest but no liquidated damages, and the

> court applied a two-year statute of limitations to their claims. [Pet. App. 82a.]

In all these respects, on Anne Arundel County's appeal, the Court of Appeals (in an opinion by Wilkinson, C.J.) affirmed the District Court. Pet. App. 91a-98a.[1]

Very simply stated, the FLSA generally provides for overtime pay for covered employees who work more than forty hours in a week and the Act contains certain full and partial exemptions from that standard. One such partial exemption is stated in FLSA §7 (k), 29 U.S.C. § 207(k). That section, insofar as relevant here, applies to "employee[s] in fire protection activities." The §7(k) partial exemption provision, "outlines a special overtime system for employees of public agencies engaged in fire protection ... activities. As construed by the Department of Labor, this section mandates that time-and-a-half be paid to fire protection workers for every hour worked in excess of fifty-three per workweek." Pet. App. 88a-89a.[2]

---

[1] The court below reversed the District Court's grant of summary judgment with regard to the plaintiffs who were classified as Lieutenants and Captains on an unrelated issue pertaining to the executive exemption to the FLSA overtime requirement. Pet. App. 99a.

[2] Section 7(k) also provides a similar partial exemption for "employees engaged in law enforcement activities."

The FLSA does not define, or otherwise elaborate, the statutory phrase "fire protection activities." The Labor Department, as the Department entrusted with the enforcement of the Act, has, however, issued regulations doing so. The basic regulation, 29 C.F.R. §553.210, provides in relevant part:

> (a) As used in sections 7(k) ... of the Act, the term "any employee ... in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards ... The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215. [Pet. App. 106a-107a].

Section 553.215, referred to in the foregoing, covers only "ambulance and rescue service employees of

a public agency *other than* a fire protection ... agency" (emphasis added). Thus, that provision is not directly addressed to the EMT employees here who *are* employed by a fire protection agency. It adds:

> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period. [Pet. App. 109a]

And, 29 C.F.R. §553.212, which *is* directly addressed to the situation of the EMT employees here, provides the so-called 20 percent rule and the final

overlay to the "employee in fire protection activities" standard:

> (a) Employees engaged in fire protection ... as described in § 553.210 ..., may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection.... The performance of such nonexempt work will not defeat ... the ... exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection ... activities for purposes of this part. [Pet. App. 108a].

On the Plaintiffs' Motion for Summary Judgment, the District Court, applying the foregoing regulations to the undisputed facts here, ruled that the EMT employees are *not* "employees in fire protection activities." Pet. App. 17a. As we have noted, the Court of Appeals affirmed. That court set out its basic rationale as follows:

> The County relies on the regulatory definition of "fire protection activities," which "include[s] rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. §553.210.

> The County, however, has not shown that EMTs' activities integrally relate to the Fire Department's fire protection activities. Further, we agree with plaintiffs that 29 C.F.R. §553.212(a) directs the conclusion that EMTs are not employees engaged in "fire protection activities." This regulation plainly imposes an across-the-board limitation on the amount of non-fire-fighting work that employees may perform and still qualify as fire protection employees under 29 U.S.C. §207(k)…

Then with regard to the application of § 553.212 to the facts of the case the Court of Appeals held:

> Plaintiffs do not qualify as fire protection employees because they exceed [§553.212's] twenty percent limit [on "nonexempt activities"]. EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters.... The record shows that, during the period at issue in this lawsuit, at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all. Medical services which are not rendered at the scene of any fire do not qualify as exempt activities.... Moreover, when the Fire Department did respond to a fire call,

> EMTs were prohibited by standard operating procedure from engaging in fire suppression activities. In light of this evidence that plaintiff EMTs generally did not – and could not – fight fires, it cannot be said that "fire protection activities" comprised more than eighty percent of their work. [Pet. App. 89a-91a].

ARGUMENT

The Fair Labor Standards Act § 7(k) question presented by this case is a fact-intensive law-application question that arises at the outer margin of that provision. That question was correctly decided by the Court of Appeals in its decision affirming the District Court. And, the decision below – in its approach, in its rationale and in its conclusion – is consistent with the other court of appeals decisions treating the same question. The certiorari petition's "First Question Presented" is, therefore, not worthy of further review.

The second question presented by the certiorari petition – asking this Court to reconsider, and to reverse, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) – is equally unworthy of this Court's consideration. The *stare decisis* principle makes such action an extraordinary last resort. And, Anne Arundel County has not come anywhere close to making a case for reconsidering and reversing *Garcia's* ruling that congressional action to cover the States and localities with regulatory laws of general application – such as the FLSA – is constitutional.

1. The FLSA § 7(k) Question

A. "Fire protection activities." FLSA § 207(k) provides for one of several partial exemptions to the general FLSA overtime pay standard. That exemption, as its express language makes plain, applies to "employee[s] in fire protection activities" and only to such employees – and *not* to all employees of fire departments.

Thus, it is well settled in the lower court cases that the task in a §7(k) case is to determine whether the employees in question are "employees in fire protection activities" and that doing so entails applying the Labor Department regulations to the employees' activities.

That is how the courts below proceeded here. Their conclusion was that it is plain beyond dispute that under the regulations and on the facts, the Anne Arundel County Fire Department Emergency Medical Technicians are *not* "employee[s] in fire protection activities."

The Court of Appeals stressed that the Anne Arundel County EMTs "perform mostly medical services and work related to medical services"; that eighty percent of their calls "required only emergency medical services and did not involve fire suppression at all;" and that "when the Fire Department did respond to a fire call, EMTs were prohibited by standard operating procedure from engaging in fire suppression activities." Pet. App. 90a-91a.

Thus, the Anne Arundel County EMTs are *not* employees who have "legal authority and responsibility to engage in the prevention, control or extinguishment of a fire," 29 C.F.R. §553.210; do *not* "form an integral part of the public agency's fire protection activities," *Id.*, and *do* "spend more than twenty percent of [their] working time in nonexempt [i.e., non-fire protection] activities," 29 C.F.R. §553.212, namely, "providing only emergency medical services [that] did not involve fire suppression at all." Pet. App. 90a.

As the Court of Appeals put it, the Anne Arundel County EMTs "are medical personnel rather than firefighters." Pet. App. 90a. The EMTs' activities are essentially the same as the activities of emergency medical technicians who day-in and day-out respond to medical emergencies having nothing to do with fires, who are employed by and based in a county hospital, and who are indisputably outside the §7(k) partial exemption.[3] That being so, the EMTs here are not "employees in fire protection activities." As the Labor Department regulations make plain, "fire protection activities" are those that are "required for and directly concerned with the prevention, control or extinguishment of fires," 29 C.F.R. § 553.210, not those required for or directly concerned with emergency medicine.

---

[3] If Congress had intended to include employees in emergency medical activities in § 7(k) that could easily have been done by including a parenthetical in the statute such as the one adding "security personnel in correctional institutions" to §7(k).

B. No Conflict in the Circuits. The *certiorari* petition attempts to generate a law question by claiming that the decision below "conflicts with the decision of the Eighth Circuit in *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied,* 118 S. Ct. 557 (1997) as well as the decision of the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991)." Pet. 16.[4]

What the petition seizes is that in both *Christian* and *Bond* the courts concluded that individuals who were denominated "emergency medical technicians" or "emergency medical service paramedics" were "employee[s] in fire protection activities" covered by the §7(k) partial overtime exemption. What the petition would ignore is that in both cases the employees' predominant activities were what the Labor Department regulations recognize to be "fire protection activities"

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[4] The petition introduces its conflict claim with an abstract discussion of supposed differences in the case law – characterized as a "variety of tests" – on the proper approach to fitting 29 C.F.R. § 553.210 and 29 C.F.R. §553.215 together. Pet. 14-15. That discussion, and the cases cited therein, are wholly irrelevant to this case. Indeed, the petition admits as much by stating that it "is unclear whether the Fourth Circuit applied any [such] test in its opinion." *Id.* at 15. The reason why the Fourth Circuit did not venture into any of these deeper waters is straight forward. The only time this relationship matters is when an EMT would not be an "employee in fire protection activities" under a §553.210/§553.212 test but would be under a combined §553.210/§553.212/§553.215 test. And, in this case, as the courts below recognized, the EMTs were not "employees in fire protection activities" because, on the facts of this case, they did not meet either test.

and that the Eighth Circuit and Fifth Circuit decisions apply and follow the regulations in that relevant regard. In the instant case, in contrast, the EMTs' predominant activities, as the same regulations recognize, were not "fire protection activities" and the Fourth Circuit decision applies and follows the regulations in that equally relevant regard. Where different cases are decided differently by following a single legal approach designed to generate different ultimate conclusions in different factual situations, the decisions are consistent with each other, *not* in conflict.

In *Bond*, the Fifth Circuit relied on 29 C.F.R. §553.215(a) which looks to whether EMTs "have received training in the rescue of fire … and accident victims …" and are "regularly dispatched to fires … and accidents" as a test of whether such employees are employees engaged in fire protection activities. Pet. App. 109a. The Fifth Circuit's *Bond* decision applies that regulation to the EMTs' own testimony that "they received such training" and that they "spend *most* of their time responding to accidents." 939 F.2d at 288 (emphasis added).

In the instant case, in contrast, the EMTs spend most of their time "providing emergency medical services [that] did not involve fire suppression at all." Pet. App. 90a. They spend relatively little time responding to accidents, and even then respond to provide emergency medical services – not to rescue the victims. The Fifth Circuit pointed out that the *Bond* EMS personnel "often work side-by-side with

firefighters at the accident scene" and that "[o]ver ninety percent of the calls to which EMS ambulances respond are co-response calls, meaning that the ambulance is accompanied by additional units from the fire department." *Id.* at 286, 288. In Anne Arundel County, on the other hand, the Court of Appeals emphasized that "at least eighty percent of the Fire Department's calls required *only* emergency medical services." Pet. App. 90a. (Emphasis added).

In *Christian* the Eighth Circuit made it explicit that the "central consideration" that dictated the result there was one that is *not* present in this case and did so in a way that approves the reasoning and result in this case:

> A central consideration under the [§553.210(a)] test is whether an employee actually fights fires. *See Carlson v. City of Minneapolis*, 925 F.2d 264, 265 (8th Cir. 1991) (per curiam) (arson investigators who did not fight or extinguish fires not fire protection employees under four-part test). *Paramedics who are not permitted to fight fires or enter a burning building and who are only dispatched to fires to treat injured individuals are not engaged in fire protection activities under the four-part test. Nalley v. Baltimore*, 796 F.Supp. 194, 200 (D. Md. 1992). The paramedics here are sworn firefighters, however, and they respond to every fire alarm where a fire has been confirmed, as well as some alarms where a fire has not been confirmed, amounting to approximately

> 50% of all fire alarms each year. They fight fires at those alarms, constitute over 40% of the public safety officers in the fire/ems bureau and on each shift, and perform fire protection support services such as equipment maintenance and training. The four-part test has no requirement that firefighting be the employees' only or primary duty, and the fact that the paramedics are also able to provide medical services while at fires and elsewhere does not eliminate their responsibility for firefighting. These paramedics are employees in fire protection activities under the four-part test in §553.210(a) … [108 F.3d at 932 (emphasis added)].[5]

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[5] The *Christian* decision hews to the same line – and the same emphasis on the dispositive significance of the paramedics' primary firefighting activities in its consideration of the significance of 29 C.F.R. 553.212:

> Here, the stipulated facts show that the paramedics respond to fires, fight them, and provide paramedic services at those fires, as well as on calls not involving fires. Nearly all of their time is spent on such activities, related training, support services, and waiting for calls, and they do not spend much time on activities unrelated to their firefighting or emergency medical service activities. Providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job.

(continued...)

The case relied upon by the Eighth Circuit, *Nalley v. Baltimore City*, was a companion case to the instant case in the District Court, and was decided by that court on the same day as the instant case, on the same rationale and with the same ultimate conclusion.[6] Thus, *Christian's* approving citation of *Nally* and its recognition of the difference between the situation there and the situation in *Nally* (and here) belies the claim that *Christian* and the instant case are in conflict.

In sum, the *certiorari* petition's claim that there is a conflict is spurious. The lower courts have uniformly applied the § 7(k) exemption and its attendant Labor Department regulations to the varying facts of each case and followed the regulations and the facts to their conclusion. The cases reach different conclusions, not because of a disagreement about the law, but because the EMTs' activities in each case are, under the regulations different in kind.

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[5](...continued)

> The district court thus erred by considering time spent on paramedic activities not stemming from a fire or car accident as nonexempt. Section 553.212 does not apply here to defeat the partial overtime exception for the paramedics. [108 F.3d at 934.]

[6] *Christian* cites *Nalley* rather than the instant case because the District Court had only *Nalley* reported in the Federal Supplement but not its companion decision herein.

C. The Correctness of the Decision Below. The *certiorari* petition challenges the merits of the decision below by arguing that *all* "ambulance and rescue service personnel" are "employees in fire protection activities" covered by the special FLSA §7(k) partial exemption. Pet. 17-20. That is so, says Anne Arundel County, by reason of FLSA legislative history allegedly showing that Congress so intended, or by reason of *Gregory v. Ashcroft*, 501 U.S. 452 (1991) which, it is said, requires that the §7(k) exemption be read to include all ambulance and rescue service personnel without regard to the fair reading of the statutory words or to a proper understanding of the legislative history.

It bears special emphasis that these arguments have been rejected by the Labor Department and the lower courts and that neither has ever been accepted by the Department or by any court. And, with good reason – both arguments are without any substance.

It is, of course, doubtful in the extreme that any legislative history could translate the explicit §7(k) statutory language – "employee[s] in fire protection activities" and "employee[s] in law enforcement activities" – into a partial exemption for "ambulance and rescue service personnel" as a class. And, there is no legislative history showing a congressional intent to put all emergency medical employees into §7(k). The Labor Department in the commentary that accompanied its §7(k) regulations carefully explained that the legislative history does not support the interpretation of §7(k) put

forward by the National League of Cities there and by Anne Arundel County here:

> The NLOC [National League of Cities] and others suggested that this section be revised so as to treat ambulance and rescue service personnel as fire protection employees ... regardless of whether such personnel form an "integral part" of the ... fire protection activities.
>
> The legislative history of the 1974 Amendments which added sections 7(k) and 13(b)(20) [exempting small fire departments of less than six employees] to the FLSA clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions.
>
> * * *
>
> It is noted that the language of the version of section 13(b)(20) proposed by the House ... would have provided a complete overtime exemption for firefighters.... The House-Senate conferees, however, specifically added language to the final versions of sections 13(b)(20) and 7(k) which limits these exemptions to individual employees who themselves are engaged in fire protection ... [52 Fed. Reg.

2022 (Jan. 16, 1987) (emphasis in original).][7]

Nor does *Gregory v. Ashcroft*, *supra,* provide Anne Arundel County any comfort in this case. *Gregory* treats with an issue far removed from the issue in this case – the proper interpretive approach to ambiguous federal statutory coverage provisions. And *Gregory* holds that where it is Congress' purpose to provide for coverage that "would upset the usual constitutional balance of federal and state power," Congress must provide a clear statement of its intent to mandate such coverage in the statute itself. *Id.* 501 U.S. at 456-70.

Congress has clearly stated its intent to cover public emergency medical personnel by the FLSA. The only question is whether EMS employees are covered by the Act's general forty hour overtime standard or by the special §7(k) fifty-three hour standard. In this context, the well settled FLSA rule of statutory interpretation is that exemptions are to be construed narrowly and that the burden is on the employers to demonstrate that the

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[7] The floor statements cited at Pet. 18-19 (120 Cong. Rec. 7317 and 7318) pertain a broader predecessor to FLSA § 7(k) in a House Bill that was *not* enacted into law. And, Rep. Quie's statement cited at Pet. 19 (120 Cong. Rec. 8598) cuts against the County in that Representative Quie stated that the exemption covered only employees engaged in activities "substantially related to *fire protection*" and "rescue and ambulance work associated with *fire protection*. . ." *Id.* at 8598, not emergency medical work related to heart attacks and the many other medical emergencies which give rise to the majority of emergency medical activities.

exemption applies. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, (1945). *See also Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27 (1987). Nothing in *Gregory* suggests, much less holds, that where coverage is clear this general FLSA rule of interpretation no longer applies with full force.

It is also to the point that the decision regarding whether the §7(k) exemption applies does not implicate the federalism interest protected by *Gregory* – "the authority of the people of the States to determine the qualifications of their most important government officials...." 501 U.S. at 463. As the Second Circuit put it in upholding the payment of standard overtime to state investigators, "a requirement that the State pay overtime to ... investigators is not so intrusive as to strike at 'the heart of representative government.'" *Reich v. New York*, 3 F.3d 581, 589-90 (2nd Cir. 1993) *cert. denied*, 510 U.S. 1163 (1994) (quoting *Gregory* 501 U.S. at 463). *See also Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993).

We believe the foregoing is dispositive on the FLSA § 7(k) issue presented in this case, but given the *certiorari* petition's apocalyptic tone, we would be remiss if we did not add that the issue here is at § 7(k)'s outer margin and thus of the most limited general significance.

The point of § 7(k), as both its statutory language and its legislative history show, is to permit public employers to set "tour of duty" schedules for *firefighters* and *police officers* that entail more than forty hours of

work for certain work weeks without generating an overtime pay obligation. The Labor Department regulations, its opinion letters and the lower court decisions more than carry out that purpose. Those regulations give generous definitions of "employee[s] in fire protection activities" that fully encompass the understanding of their scope of application at the time the FLSA was amended and the general understanding of the statutory words.

The result is that public employers have enjoyed – and after this decision will continue to enjoy – the operational flexibility in carrying out their firefighting and peacekeeping programs they have historically enjoyed. Contrary to Anne Arundel County's argument, the FLSA does not inhibit "the operation of a local government fire department and its ability to continue to provide emergency services," (Pet. 11) any more than it inhibits Ford Motor Company's ability to build cars.

2. The *Garcia v. San Antonio Metropolitan Transit Authority* Question

The *certiorari* petition (at pp. 13-14; 21-27), makes it plain that its FLSA § 7(k) question is a stalking horse – and a lame one at that – by asking the Court to reconsider *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Essentially the County requests the Court to overrule *Garcia's* square holding that Congress acted within its Article I Commence Clause powers, without trenching on the Tenth Amendment, in extending the FLSA to public employers.

The *stare decisis* principle stands squarely against Anne Arundel County's request. And, as we now show, *none* of the "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law and to gauge the respective costs of reaffirming and overruling a prior case," *Planned Parenthood of Southern PA v. Casey*, 505 U.S. 833, 854 (1992), point toward reconsidering and overruling *Garcia*.

This Court has noted that the *Garcia* rule is one of limited scope concerning "the authority of Congress to subject state governments to *generally applicable laws*." *New York v. United States*, 505 U.S. 144, 160 (1992) (emphasis added). That is of critical significance in two regards.

First, federal laws that are generally applicable throughout the private and public sector are, by their nature, inherently unlikely to require State compliance that would "directly impair [the State's] ability to structure integral operations in areas of traditional governmental functions." *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 287-288 & n. 29 (1981) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)). Certainly, the last 15 years experience shows that the FLSA's modest minimum employment standards applicable only to lower level

employees, work no such impairment – Anne Arundel County cites nothing to the contrary.[8]

Second, and equally to the point, the *Garcia* rule, recognizing the constitutionality of such federal laws of general application, has brought order and predictability to an area of constitutional law that had known neither. At every iteration this Court's case law on the Commerce Clause/Tenth Amendment has recognized that Congress has the authority to apply general regulatory laws to the States in their "proprietary functions." The point of contention had been the application of such laws to the States in their "traditional governmental functions." And, the difficulty was that in that context, as in the tax immunity context, the governmental/proprietary dichotomy proved "unworkable." *See Garcia,* 469 U.S. at 537 - 47.

Garcia purified and simplified the constitutional law by following the tax immunity example and by purging the Commerce Clause/Tenth Amendment jurisprudence of what had proved to be an unworkable doctrinal gloss. The Court has continued to follow *Garcia's* approach. As the court below pointed out:

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[8]We note that it comes with particularly poor grace for the County to attack the special exceptions that run *in favor of* public employers as "special directives" that somehow put the public employers in a worse position than if the FLSA had been extended to the public sector *in haec verba*. *See* Pet. 23-24.

> As recently as last term the Court refused to grant immunity from suit under 42 U.S.C. § 1983 for private sector employees performing a "governmental function" on grounds that a "purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities." *Richardson .v McKnight,* 117 S.Ct. 2100, 2106 (1997). [Pet. App. 86a].

In contrast, no post-*Garcia* case so much as suggests revival of the "governmental/proprietary" dichotomy for judging the constitutionality of federal enactments. It is telling that in the end all that Anne Arundel County offers in place of the *Garcia* rule is a rule based on that unworkable dichotomy and a return to the complexity and confusion of the pre-*Garcia* regime.

Over the past 15 years, the *Garcia* rule has, moreover, engendered just the kind of "reliance that would ... add inequity to the cost of repudiation." *Planned Parenthood of Southern PA v. Casey*, 505 U.S. at 854. Public employees have come to rely on the FLSA as their assurance of the basic labor standards that characterize a civilized society. And, public employers – with the few holdouts such as Anne Arundel County's Fire Department – have arranged their relationships with their employees in a manner that takes proper account of the FLSA.

In the final analysis, Anne Arundel County's case for reconsidering and overruling *Garcia's* "laws of general application" rule comes down to the claim that the Court's Federalism decisions from *New York v. United States, supra,* through *Printz v. United States,* 117 S.Ct. 2365 (1997) have "so far developed" a set of "related principles of law" as to have left the *Garcia* rule "no more than a remnant of abandoned doctrine." *Planned Parenthood of Southern PA v. Casey*, 505 U.S. at 855.

There has been no such erosion of the *Garcia* "laws of general application" rule. None of the cases the *certiorari* petition cites had anything to do with the constitutionality of applying such laws to the States. And, both *New York* and *Printz* explicitly recognize that the Tenth Amendment question being considered and the *Garcia* question are conceptually distinct. As Justice O'Connor put it in *New York*:

> Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws.... This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. [505 U.S. at 160-61].

See also Printz, 117 S.Ct. at 2383.

Consistent with that recognition, *New York* and *Printz* rule that federal laws addressed *solely* to the States that "commandeer" the State's core legislative and executive functions transgress the Tenth Amendment and both decisions do so in a manner that recognizes the continued vitality of the *Garcia* "laws of general application" rule. Indeed, in *Auer v. Robbins*, 117 S.Ct. 905 (1997), an FLSA case raising statutory questions on the "salary basis" test for determining whether the Act's executive exemption applies, the Court reaffirmed *Garcia's* continuing vitality by stating: "In 1974, Congress extended FLSA coverage to virtually all public-sector employees ... and in 1985 we held this exercise of power consistent with the Tenth Amendment [in *Garcia*]." 117 S.Ct. at 909.[9]

The sum of the matter is that over the past 15 years the *Garcia* "laws of general application" rule has proved workable in both practical and doctrinal terms. Nothing the Court has done or said since has diminished that rule's vigor or otherwise put it into question. And, while Anne Arundel County suggests that the *Garcia* rule gives too much deference to the federal "political process" and thereby stands as an obstacle to the full and proper development of the Tenth Amendment's

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[9] *United States v. Lopez*, 514 U.S. 549 (1995) and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 549 (1996) (cited Pet. 22) were not Tenth Amendment cases and do not contain a word addressed to *Garcia's* rule or its rationale. And, while *Gregory v. Ashcroft, supra,* (also cited Pet. 22) did raise Tenth Amendment issues, none were decided and again nothing in the decision speaks to the *Garcia* rule.

protection of state sovereignty, *New York* and *Printz* demonstrate the contrary. There is no consideration of any substance, then, that supports the extraordinary step of departing from the *stare decisis* principle by reconsidering and overruling *Garcia*.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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No. 98-266

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, PETITIONER

v.

JOHN D. WEST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, on the facts of this case, that respondents did not perform "fire protection activities" within the meaning of Section 7(k) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(k), which provides a special maximum-hours and overtime standard for public-sector fire protection and law enforcement employees.

2. Whether the court of appeals correctly held that the FLSA, as applied to petitioner, does not contravene constitutional principles of federalism.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-266

ANNE ARUNDEL COUNTY, PETITIONER

v.

JOHN D. WEST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 75a-99a) is reported at 137 F.3d 752. The order of the district court granting the private respondents' motion for partial summary judgment on the application of 29 U.S.C. 207(k) to this case (Pet. App. 2a-17a) is unreported. The district court's later order granting and denying summary judgment to the parties on other statutory issues (Pet. App. 20a-57a) is reported at 3 Wage & Hour Cas. 2d (BNA) 234.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on May 13, 1998. Pet. App. 100a-105a. The petition for

a writ of certiorari was filed on August 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a), establishes general maximum hours and overtime pay requirements for employees covered by the Act. Section 7(k) of the FLSA, 29 U.S.C. 207(k), establishes a specific, more lenient overtime rule for employees of public agencies engaged in "fire protection activities" and "law enforcement activities." Section 7(k) itself does not define either "fire protection activities" or "law enforcement activities." The Department of Labor has promulgated regulations interpreting the scope of Section 7(k), two of which are relevant to this case. Those regulations first provide, in pertinent part, that an employee "in fire protection activities" is any employee

> (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

29 C.F.R. 553.210(a). This part of the regulation sets forth what is known as the "four-part test" for deter-

mining whether an employee is engaged in fire protection activities. In addition, the same regulation provides further (*ibid.*) that "[t]he term [fire protection activities] would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215." That additional part of the regulation sets forth what is known as the "integral part test."[1]

In a second regulation, the Department of Labor has provided that an employee whose work meets one of the tests in Section 553.210, quoted above, may nonetheless fail to qualify for the special Section 7(k) overtime standard if he spends more than 20% of his time on "nonexempt work." 29 C.F.R. 553.212. Nonexempt work is defined as "work which is not performed as an incident to or in conjunction with [the employee's] fire protection * * * activities." 29 C.F.R. 553.212(a). That regulation is commonly known as the "80/20 rule."

2. Private respondents John D. West *et al.* (respondents) are emergency medical technicians currently or formerly employed by the Emergency Medical Services (EMS) division of the Anne Arundel County Fire Department. Pet. App. 81a. Respondents filed this action against petitioner Anne Arundel County, claiming overtime compensation alleged to be due under the FLSA. *Id.* at 82a. Petitioner contended in defense that

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[1] Section 553.215 of the Department's regulations, to which Section 553.210 refers, is not directly applicable in this case. Section 553.215 covers ambulance and rescue service employees who are employees of a public agency other than a fire protection or law enforcement agency. It covers the situation, for example, of rescue service employees who are employed by a special rescue service agency, but who accompany firefighters who are organized under a volunteer fire department rather than a public agency. Section 553.215 is discussed further at pp. 14-15, *infra*.

respondents' employment fell within the scope of the FLSA's more lenient maximum-hours standard for public-sector employees engaged in fire protection and law enforcement activities. *Id.* at 89a. The district court granted summary judgment for respondents with respect to their claims for overtime compensation and prejudgment interest, and denied their request for liquidated damages.[2] *Id.* at 18a.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. After oral argument, the court of appeals ordered supplemental briefing on the following question: "In light of the Supreme Court's decision in *Printz v. United States*, 65 U.S.L.W. 4731 (June 27, 1997), whether the Fair Labor Standards Act may be constitutionally applied to the salary determinations at issue in this case." Pet. App. 80a. The United States intervened at that juncture, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the FLSA.

3. After renewed briefing and oral argument, the court of appeals affirmed the district court's decision on the application of Section 7(k) to this case. Pet. App. 88a-91a. It also held that the FLSA is constitutional as applied to petitioner. *Id.* at 82a-88a.

With respect to the constitutional issue, the court ruled that this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528

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[2] Petitioner also contended that some respondents fell within exemptions to the FLSA's maximum-hours requirements for executive and administrative personnel. See *Auer* v. *Robbins*, 519 U.S. 452, 455 (1997). The district court ruled against petitioner on that contention also, but the court of appeals reversed in significant part, and held that some of the respondents were executive and administrative personnel not entitled to overtime compensation. Pet. App. 91a-98a.

(1985), which upheld the constitutionality of the FLSA as applied to state and local government employers, was dispositive. Pet. App. 88a. The court explained (*ibid.*) that, because "*Garcia* is specifically on point," and because this Court did not overrule *Garcia* in *Printz* v. *United States*, 117 S. Ct. 2365 (1997), "the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect." The court also noted that, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), an FLSA case involving a local government agency decided the same Term as *Printz*, this Court "did not move to reconsider *Garcia* and enforced the FLSA against a local government agency without addressing the constitutional question." Pet. App. 88a.

On the merits of respondents' overtime claim, the court of appeals affirmed the district court's ruling that respondents did not perform "fire protection activities" within the meaning of Section 7(k). The court concluded (Pet. App. 89a) that petitioner had not shown that respondents' activities "integrally relate to the Fire Department's fire protection activities" within the meaning of 29 C.F.R. 553.210. It also ruled (Pet. App. 90a), based on the factual record in this case, that "[respondents] do not qualify as fire protection employees because they exceed th[e] twenty percent limit" on nonexempt activities in the Department of Labor's 80/20 rule (29 C.F.R. 553.212(a)).

In explaining the basis for those conclusions, the court emphasized that respondents "perform mostly medical services and work related to medical services" and "are medical personnel rather than firefighters." Pet. App. 90a. The court noted that the record demonstrated that, during the relevant time period, "at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve

fire suppression at all." *Ibid.* In addition, the court noted that "when the Fire Department did respond to a fire call, [respondents] were prohibited by standard operating procedure from engaging in fire suppression activities." *Id.* at 91a. "In light of this evidence that [respondents] generally did not—and could not—fight fires, it cannot be said that 'fire protection activities' comprised more than eighty percent of their work." *Ibid.*

4. Petitioner filed a petition for rehearing and suggestion of rehearing en banc, in which it relied for the first time on the "plain statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), in support of its argument that the basic overtime standard of Section 7(a) of the FLSA did not apply to respondents' employment. See Pet. for Reh'g 4-6. The court of appeals denied rehearing on May 13, 1998. Pet. App. 105a.

ARGUMENT

The court of appeals' decision on the merits of respondents' overtime claim is consistent with the Department of Labor's regulations implementing Section 7(k). Its ruling that the FLSA is constitutional as applied to this case is also correct. Neither aspect of the court of appeals' decision conflicts with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[3]

1. a. Respondents brought this overtime action on the theory that their employment was subject to the

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[3] The United States intervened in this case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the application of the basic maximum-hours and overtime provisions of the FLSA to petitioner, a local governmental entity. The United States did not take a position in the lower courts on the application of the FLSA to the facts of this case.

basic maximum-hours and overtime requirements of the FLSA, 29 U.S.C. 207(a), rather than the provisions of Section 7(k), 29 U.S.C. 207(k), which establish a special overtime standard for public sector employees engaged in "fire protection activities" and "law enforcement activities." Section 7(k) was enacted in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60, and was intended as a limited "[o]vertime [e]xemption for [p]olicemen and [f]iremen." H.R. Conf. Rep. No. 953, 93d Cong., 2d Sess. 26 (1974). Section 7(k) requires overtime pay only when a firefighter's tour of duty exceeds 212 hours over 28 consecutive days (or a proportionate number of hours if the employee's tour of duty is 7 to 27 consecutive days) rather than 40 hours in a workweek. See 29 U.S.C. 207(k); 29 C.F.R. 553.201(a), 553.230. These special rules "reflect[] the uniqueness of the firefighting service," which, Congress understood, was organized around extended tours of duty rather than workweeks. H.R. Conf. Rep. No. 953, *supra*, at 27.

Section 7(k) does not define "fire protection activities," and, in particular, it does not specifically address the situation of ambulance and rescue workers who (at least on occasion) accompany firefighters to the scene of a fire but do not themselves fight fires. The responsibilities and activities of workers who perform ambulance and rescue services vary considerably from jurisdiction to jurisdiction; in some jurisdictions, they actually fight fires, but in others (as in this case, see Pet. App. 91a), they are prohibited from doing so. Accordingly, exercising authority granted by Congress to implement the Fair Labor Standards Amendments of 1974, see Pub. L. No. 93-259, § 29(b), 88 Stat. 76, the Secretary of Labor has issued regulations implementing Section 7(k). Those regulations set forth a

fact-sensitive approach to resolve whether emergency service employees are subject to the provisions of Section 7(k). See 29 C.F.R. 553.210(a), 553.212(a), 553.215. Because Congress has not defined "fire protection activities," the Secretary's regulatory construction of that term is entitled to deference, and her interpretation of her own regulations construing the term is entitled to particular deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 461 (1997).

Under the Secretary's regulations, an emergency medical service employee is engaged in "fire protection activities" if that employee meets either the "four-part test" set forth in 29 C.F.R. 553.210(a), or, alternatively, the "integral part test," which is also set forth in Section 553.210(a). Under the four-part test, application of Section 7(k) turns on whether the employee (1) "is employed by an organized fire department or fire protection district"; (2) "has been trained to the extent required by State statute or local ordinance"; (3) "has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type"; and (4) "performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards." 29 C.F.R. 553.210(a). The four-part test generally provides that employees who are engaged in core firefighting functions as well as closely related support functions are covered by Section 7(k).

The Secretary's alternative "integral part" test applies in many situations involving persons employed principally as rescue and ambulance service personnel rather than as actual firefighters. Under the integral

part test, such employees are engaged in "fire protection activities" if "such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. 553.210(a). A rescue service employee may satisfy the integral part test if (for example) he is regularly called out to perform emergency medical service during fires and if he receives certain training (see 29 C.F.R. 553.215(a)), even if he does not himself fight fires, because in such a situation his function may form an integral part of the public agency's fire protection activities.

In addition, however, employees who meet either the four-part test or the integral part test are also subject to the "80/20 rule" set forth in 29 C.F.R. 553.212. Under the 80/20 rule, a public agency may not apply the special overtime rules of Section 7(k) to those employees who spend more than 20% of their time in "nonexempt work"—*i.e.*, "work which is not performed as an incident to or in conjunction with their fire protection * * * activities." 29 C.F.R. 553.212(a). Thus, under the Department's regulations, the fact that a rescue service employee accompanies the fire department to fire scenes on a regular basis will not make that employee subject to the special rules of Section 7(k) for fire protection activities, if more than 20% of that employee's time is spent on functions that are not fire-related, such as responding to calls by persons who are experiencing non-fire-related medical emergencies. Rescue service employees who spend less than 80% of their time accompanying the fire department to fire scenes are not covered by Section 7(k), even though their participation at fire scenes might be regular when such scenes occur, and even though that function at the scene of a fire might be considered integral to the operations of the fire department.

Furthermore, for purposes of allocating an employee's time under the "80/20 rule," Department of Labor guidance suggests that employers should take into account the differences between employees who potentially fall within Section 7(k) because they meet the four-part test and are principally engaged in firefighting, and those employees who do not fight fires themselves but whose non-firefighting duties may form an "integral part" of the firefighting operation. Employees who satisfy the four-part test and are "principally engaged as firefighters," but are cross-trained as emergency medical technicians, may *also* perform ambulance and rescue activities without jeopardizing their status as firefighters, on the ground that such ambulance and rescue activities may properly be regarded as "incidental to the employee's fire protection duties." See App., *infra*, at 1a-2a (Department of Labor Opinion Letter (Feb. 2, 1995)). As a result, if the employees are *principally* engaged as firefighters, then they may also perform ambulance and rescue activities "related to medical emergencies, rather than fires, crime scenes, riots, natural disasters, and accidents," without having those activities count towards the 20% limitation on nonexempt work. *Ibid.*

In the case of employees who are *not* principally engaged in actual firefighting, but who potentially fall within the special standard of Section 7(k) only because their functions satisfy the "integral part" test, their ambulance and rescue activities related to purely medical emergencies are not considered "incident to or in conjunction with [their] fire protection" activities, and thus *do* count toward the 20% limitation. Such employees are not "principally engaged as firefighters." Their ambulance and rescue activities associated with non-fire medical emergencies are not "incident to or in

conjunction with" fire protection activities; rather, it is the essence of their work. Thus, a rescue service employee who is occasionally called out to provide emergency service during a fire—but who is also regularly called out for non-fire emergencies, and who never or rarely engages in actual firefighting—will likely not be considered to be engaged in "fire protection activities" within the meaning of Section 7(k).

b. The Secretary of Labor's regulations and guidance recognize that determining whether a particular employee is engaged in firefighting for purposes of the FLSA is a fact-sensitive inquiry. Decisions of the courts of appeals similarly reflect the fact-bound nature of the inquiry. For example, the court of appeals in this case stated, based on its review of the record before it, that respondents "were prohibited by standard operating procedure from engaging in fire suppression activities," and "perform[ed] mostly medical services and work related to medical services." Pet. App. 90a-91a. The court thus concluded that respondents were "medical personnel rather than firefighters." *Id.* at 90a. Those findings lead to the conclusion that respondents were not "principally engaged in firefighting," and that they *failed* the four-part test, particularly the fourth part of that test, concerning the performance of firefighting activities. See 29 C.F.R. 553.210(a); p. 8, *supra*. Thus, respondents were potentially covered by Section 7(k) only if they met the integral part test. Further, under the record as evaluated by the court of appeals, the ambulance and rescue services that respondents regularly performed in connection with medical emergencies—as opposed to those performed at the scene of a fire or car accident—should not be considered "incident to or in conjunction with" fire protection activities under the 80/20 rule, and should count toward the 20%

limit on nonexempt work. The result reached by the court of appeals—that respondents were not engaged in fire protection activities—is therefore fully consistent with the Secretary's regulations.[4]

Petitioner argues (Pet. 16-17) that the court of appeals' decision conflicts with decisions of the Fifth and Eighth Circuits. That contention is without merit. Although, in the cases cited by petitioner, the courts ruled that the employees were covered by Section 7(k), that divergence from the result reached in this case reflects only differences of fact, not conflicting interpretations of governing law.

In *Christian* v. *City of Gladstone*, 108 F.3d 929, cert. denied, 118 S. Ct. 557 (1997), the Eighth Circuit found that the employees in question satisfied the "four-part test." The court stressed that "[a] central consideration under [that] test is whether an employee actually fights fires." *Id.* at 932. It observed that the employees in that case were "sworn firefighters * * * [who] respond to every fire alarm where a fire has been confirmed, as well as some alarms where a fire has not been confirmed[.]" *Ibid.* It also noted that the employees "fight fires at those alarms, constitute over 40%

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[4] Petitioner argues that the district court found that respondents met the four-part test, and that the court of appeals erred by deciding that Section 7(k) does not apply to "public safety employees who meet the four-part test[.]" See Pet. 8, 17. But the district court merely stated that the fourth step of the four-part test "may appear to be satisfied," and then proceeded to find that Section 7(k) did not apply to respondents because they spent far less than 80% of their time in fire-related activities. Pet. App. 15a-16a. In any case, to the extent that petitioner is arguing that the court of appeals should have found that respondents met the four-part test, that argument is wholly factbound and does not warrant review in this Court.

of the public safety officers in the fire/ems bureau and on each shift, and perform fire protection support services such as equipment maintenance and training." *Ibid.* Indeed, the Eighth Circuit specifically distinguished emergency medical service personnel—comparable to the respondents in the present case (see Pet. App. 91a)—who do not actually fight fires and "who are only dispatched to fires to treat injured individuals," and concluded that such personnel would not qualify as employees "in fire protection activities under the four-part test." 108 F.3d at 932. The result in *Christian* is therefore entirely consistent with the result reached by the court of appeals in this case.

The Fifth Circuit's decision in *Bond* v. *City of Jackson*, 939 F.2d 285 (1991), also rests on a fact pattern that is significantly different from the one that the courts below found in this case. In *Bond*, the court held that the plaintiffs met the "integral part" test because they "received training in the rescue of fire and accident victims," "they spen[t] most of their time responding to accidents,"[5] and, "[i]n over ninety percent of the EMS calls, the EMS ambulances co-respond[ed] with one or more other units from the fire department." *Id.* at 288. Here, in contrast, the court of appeals found that respondents spent most of their time on emergency medical services that were not connected with fire protection (see Pet. App. 90a-91a) and thus concluded that petitioner failed to show that respondents

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[5] Automobile and certain other accidents (such as explosions) may present a fire risk, such that fire department units responding to such accidents are considered to be engaged in fire protection activities. See 29 C.F.R. 553.215(a) (employees must be regularly dispatched to "fires, crime scenes, riots, natural disasters and accidents" to be considered engaged in fire protection activities).

met even the "integral part" test (*id.* at 89a). The difference between this case and *Bond* therefore turns on differences in the activities actually performed by the plaintiffs in the two cases.

c. Petitioner also argues (Pet. 14-15) that there is confusion in the lower courts regarding the interpretation of the "integral part" test set forth in 29 C.F.R. 553.210(a). Petitioner contends that the courts are divided as to whether the "integral part" test is the same as the "substantially related" test set forth in 29 C.F.R. 553.215, the section to which Section 553.210(a) makes a cross-reference. See p. 3, n.1, *supra*. The "substantially related" test provides that ambulance and rescue service employees "of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection * * * activities" if "their services are substantially related to firefighting[.]" 29 C.F.R. 553.215(a).

Petitioner's contention provides no basis for further review in this Court. The court of appeals did not address any purported connection between the "integral part" test and the "substantially related" test. Thus, even if there were confusion in the case law regarding that issue, this case would not be an appropriate vehicle to resolve it.

In any event, the state of the law in the circuits does not warrant this Court's review. The Sixth and Seventh Circuits have held that there is no material difference between the two tests; they have noted that the "integral part" test expressly refers to the "substantially related" test in Section 553.215, and have reasoned that it would not make sense for the standard applicable to emergency medical services employees to turn on the identity of the particular agency that happens to employ them. See *Alex* v. *City of Chicago*,

29 F.3d 1235, 1240-1242 (7th Cir.), cert. denied, 513 U.S. 1057 (1994); *Justice* v. *Metropolitan Gov't of Nashville*, 4 F.3d 1387, 1396 (6th Cir. 1993). In *Wouters* v. *Martin County*, 9 F.3d 924 (1993), cert. denied, 513 U.S. 812 (1994), the Eleventh Circuit stated in summary fashion that the "integral part" test "presents an inquiry distinct from the substantially related standard." *Id.* at 931. The court did not explain possible distinctions between the two tests, however, and it left application of those tests to the district court on remand. *Id.* at 932. Thus, there is no conflict between *Wouters* and *Alex* or *Justice*, and in any event the court of appeals did not express a view on the issue.

For the foregoing reasons, the court of appeals' conclusion that the special maximum-hours and overtime provisions of Section 7(k) did not apply to respondents' employment is consistent with the Secretary of Labor's regulations and does not conflict with any other appellate decision. Further review of that statutory issue is not warranted.

2. Petitioner further relies (Pet. 17-20) on *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), to argue that the basic maximum-hours provision of Section 7(a) of the FLSA does not apply to it. Petitioner contends that, under the "plain statement" rule of *Gregory*, Congress was required to make "unmistakably clear" that it was subject to the FLSA's general 40-hour maximum-hours standard of Section 7(a) rather than the special maximum-hours provision of Section 7(k), that Congress has failed to do so, and that the absence of a "plain statement" precludes application of the 40-hour per week standard in this case. That argument also fails.

As an initial matter, we note that the court of appeals did not address any argument concerning the "plain

statement" rule of *Gregory*. Petitioner did not raise that argument until its petition for rehearing, which the court of appeals denied without comment. See Pet. App. 105a. There is, accordingly, no reason for the Court to consider petitioner's *Gregory* argument at this late stage. See *Auer* v. *Robbins*, 519 U.S. at 464; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the court of appeals had addressed the question, however, *Gregory* would not have advanced petitioner's position. The issue before the Court in *Gregory* was whether an ambiguous exception to coverage of state employees by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, for elected officials and policymaking officials, covered state judges. 501 U.S. at 464-467. In considering whether Congress had intended to bring state judges within the coverage of the ADEA, the Court emphasized that that question touched on "the authority of the people of the States to determine the qualifications of their most important government officials[,] an authority that lies at the heart of representative government." *Id.* at 463 (internal quotation marks and footnote omitted). Since it was "at least ambiguous" whether state judges fell within the ADEA's exception for policymaking officials (*id.* at 467, 470), the Court concluded that the ADEA should not be construed to apply to state judges without a plain statement by Congress to that effect (*id.* at 470).

Petitioner's effort to analogize this case to *Gregory* is without merit. Congress has made it unmistakably clear in the FLSA that maximum-hours requirements cover state and local employers and employees, including fire protection employees. 29 U.S.C. 203(d), 203(e)(2)(C), 203(x), 207(k); cf. *Pennsylvania Dep't of*

Corrections v. *Yeskey*, 118 S. Ct. 1952, 1954 (1998) (Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327, "plainly covers state institutions without any exception that could cast the coverage of prisons into doubt") (emphasis omitted). The only question here, based on the facts of this case, is *which* provision of the FLSA covers respondents. If respondents are employees engaged in "fire protection activities," then they must be paid overtime for every hour worked in excess of 53 hours per workweek. Pet. App. 89a; 29 U.S.C. 207(k); 29 C.F.R. 553.230. If they are not engaged in fire protection activities, then they must be paid overtime for every hour worked in excess of 40 hours per workweek. Pet. App. 88a; 29 U.S.C. 207(a). Congress has clearly stated its intent that respondents be covered by some provision of the FLSA; the question of which provision is resolved by reference to the text of the FLSA, the Secretary's regulations implementing and interpreting the FLSA, and the factual record compiled in the case. Therefore, the *Gregory* rule, which was to make "absolutely certain that Congress intended [to] exercise" its constitutional powers (501 U.S. at 464), is irrelevant to this case.

Under petitioner's approach, Congress would be forced to draft legislation at a level of excessive detail, specifically identifying each and every aspect of state activity that might fall within the reach of its statutes; Congress could not rely on a general approach, reaching state employment broadly. That result certainly does not follow from the Court's decision in *Gregory*, which provides a rule of construction for ambiguous statutes, where it is unclear whether Congress intended to cover a particular state function at all. In the FLSA, Congress stated clearly that it intended to exercise its

constitutional powers; having done so, Congress could also rely on the Secretary of Labor to implement the FLSA.

In addition, this case, unlike *Gregory*, does not involve regulation of a state governmental function that "lies at the heart of representative government." *Gregory*, 501 U.S. at 463 (internal quotation marks omitted). While the provision of emergency medical services is undoubtedly an important public service, it does not implicate core sovereign functions in the same way as does the exercise of a State's judicial power. See also *Reich* v. *New York*, 3 F.3d 581, 589-590 (2d Cir. 1993) (also rejecting State's reliance on *Gregory* in FLSA context), cert. denied, 510 U.S. 1163 (1994); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993) (similar), cert. denied, 510 U.S. 1081 (1994).[6] The court of appeals therefore properly concluded that, under the Secretary's regulations, the special rule of Section 7(k) does not govern this case. The plain-statement rule of *Gregory* has no bearing on that conclusion.[7]

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[6] In *Yeskey*, the Court addressed whether the ADA covers state prisons to *any* extent, and in doing so, it assumed without deciding that the *Gregory* "plain statement" rule governed whether the ADA applied to the administration of state prisons. See 118 S. Ct. at 1954. The Court noted that "[o]ne of the primary functions of government * * * is the preservation of societal order through enforcement of the criminal law," and that "maintenance of penal institutions is an essential part of that task." *Ibid.* (internal quotation marks omitted). Whereas emergency medical and rescue services are important public services, they are not part of the essence of government, as is enforcement of the criminal law.

[7] Petitioner also contends (Pet. 19-20) that courts have erred in applying to public employers the statutory rule of construction that FLSA exemptions must be narrowly construed against the employer; it argues that the rule of narrow construction of FLSA

3. Finally, petitioner argues (Pet. 21-27) that the FLSA is unconstitutional as applied to this case, and that certiorari is warranted because (it contends) this Court's recent decisions cast doubt on *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which upheld the application of the FLSA to state and local governments. That contention is without merit. The court of appeals correctly held that this Court's ruling in *Garcia* remains good law and is dispositive of the FLSA's constitutionality. See also *Adams* v. *Department of Juvenile Justice*, 143 F.3d 61, 65 (2d Cir. 1998) (similarly rejecting contention that *Garcia* is no longer good law); *Bowman* v. *City of Indianapolis*, 133 F.3d 513, 518 (7th Cir. 1998). *Garcia* squarely upheld the application of the FLSA to state and local governments, and therefore directly controls this case.

Petitioner argues, however (Pet. 22-23), that the Court's decisions in *Printz* v. *United States*, 117 S. Ct. 2365 (1997); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); *United States* v. *Lopez*, 514 U.S. 549 (1995); *New York* v. *United States*, 505 U.S. 144 (1992); and *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), have undermined the continued vitality of *Garcia*. Those decisions, however, have little to do with the constitutional issue presented in this case.

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exemptions conflicts with *Gregory*. That contention is meritless. First, the court of appeals below did not rely on the rule of narrow construction of exemptions in reaching its decision; the court found that the record clearly showed that respondents are "medical personnel rather than firefighters" who "did not—and could not—fight fires," and it applied the Secretary's regulations to its factual findings. Pet. App. 90a-91a. In any event, as set forth in the text, the *Gregory* plain-statement rule is inapplicable to this case.

Printz involved interim provisions of the Brady Handgun Violence Prevention Act (Brady Act), 18 U.S.C. 922(s), which required local law enforcement officials to enforce federal law. Specifically, the Brady Act required local officials to make a reasonable effort to determine the legality of proposed handgun sales within five days of the proposed purchase. *Printz*, 117 S. Ct. at 2369. In holding the Brady Act unconstitutional, the Court relied on its previous decision in *New York* v. *United States*, 505 U.S. 144 (1992), which held that constitutional principles of federalism bar Congress from requiring state or local officials to "enact or administer a federal regulatory program." See *id.* at 188; *Printz*, 117 S. Ct. at 2384. In both *Printz* and *New York*, the Court distinguished statutes that regulate the activities of States affecting commerce from statutes that require the States to regulate. As the Court observed in *Printz*, "[t]he Commerce Clause * * * authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 2379 (quoting *New York*, 505 U.S. at 166). Likewise, *Printz* concluded that the Necessary and Proper Clause empowers Congress to "pass laws requiring or prohibiting certain acts," but does not grant Congress "the power directly to compel the States to require or prohibit those acts." *Ibid.*

At a minimum, therefore, when an Act of Congress applies to private entities as well as state and local governments, there can be no question that Congress has properly exercised its Commerce Clause power to regulate primary conduct and has not commandeered the States to enact or enforce a federal regulatory program. The FLSA's application to public employers is a straightforward instance of Congress's valid exer-

cise of its Commerce Clause powers. In no way does the FLSA commandeer the States to enact or enforce the federal wage and hours laws. The basic rules of primary conduct are set forth in the statute (subject to implementation by the Secretary of Labor), and all employers covered by the Act are subject to those rules. The Secretary of Labor, not the States or local governments, is responsible for administering the FLSA, and the Secretary and individual employees may bring suit against employers (including local governmental entities such as petitioner) alleged to be in violation of the FLSA. 29 U.S.C. 204, 216(b)-(c), 217. For that reason, the Court in *New York* expressly distinguished *Garcia* and declined "to apply or revisit [its] holding[.]" *New York*, 505 U.S. at 160; see also *Printz*, 117 S. Ct. at 2383; *Auer*, 519 U.S. at 457 (noting that, in *Garcia*, the Court "held that this exercise of power [*i.e.*, Congress's extension of FLSA coverage to public sector employers] was consistent with the Tenth Amendment").

Gregory likewise confirms the continued validity of *Garcia*. In *Gregory*, the Court, citing *Garcia*, stated that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." 501 U.S. at 464. The Court then explained that resolution of the question at issue did not require it to "review limitations placed on Congress' Commerce Clause powers by our federal system." *Ibid.* The Court reiterated that "this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers[.]" *Ibid.* Thus, the Court resolved the issue in that case as

a matter of statutory interpretation, not constitutionality.[8]

The Court's decision in *Lopez* (a case involving conduct of a private person rather than of a state or local government) also does not cast doubt on its decision in *Garcia*. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A) (1994), exceeded Congress's authority under the Commerce Clause. The Court in *Lopez* overruled none of its precedents, however, and it confirmed that the Commerce Clause authorizes Congress to address "persons or things in interstate commerce" and activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. Moreover, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (emphasis omitted). *Lopez* therefore supports the validity of the FLSA, for there can be no serious doubt that petitioner's employment of its employees bears a "substantial relation" to interstate commerce. Indeed, even in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which invalidated the application of the FLSA to the States on Tenth Amendment grounds, the Court referred to the 1974 extension of the FLSA to state and local governments as "undoubtedly within the scope of

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[8] This Court's decision in *Seminole Tribe* also casts no doubt on *Garcia*. *Seminole Tribe* held that Congress lacked authority under the Indian Commerce Clause to abrogate a State's Eleventh Amendment immunity from suit. See 517 U.S. at 60-73. That case involved limitations on Congress's power to expand federal court jurisdiction under Article III and the Eleventh Amendment, however, and did not concern Congress's substantive power under the Commerce Clause to regulate state activities. See *id.* at 72-73.

the Commerce Clause." *Id.* at 841. And in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court held that Congress had power under the Commerce Clause to extend the FLSA to state schools and hospitals.[9] See also *Garcia*, 469 U.S. at 537 (Commerce Clause power extends to regulation of "local transit system engaged in intrastate commercial activity" because "Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce"). There is therefore no basis for a reexamination of *Garcia*, and further review of the constitutional question in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998

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[9] Although *Wirtz* was later overruled in *National League of Cities* v. *Usery*, see 426 U.S. at 855, *National League of Cities* was in turn overruled in *Garcia*, 469 U.S. at 557.

APPENDIX

Department of Labor Opinion Letter (Feb. 2, 1995)

This is in response to your inquiry concerning the application of § 7(k), 29 U.S.C. 207(k), of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, to firefighters who are cross-trained as emergency medical technicians (EMTs). We regret the delay in responding to your inquiry.

Section 7(k) of the FLSA provides a partial overtime exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. 29 CFR § 553.201. The term "any employee . . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by state statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, etc. The term also includes rescue and ambulance personnel that form an integral part of the public agency's fire protection activities. 29 CFR § 553.210(a).

We have concluded that firefighters who are cross-trained as EMTs qualify for exemptions under § 7(k) as fire protection employees where they are principally engaged as firefighters meeting the four tests outlined in 29 CFR § 553.210(a), as set forth above, and where

the EMT functions they perform meet the tests described in 29 CFR § 553.215 for ambulance and rescue employees. Under these circumstances, we would consider that ambulance and rescue activities are incidental to the employees' fire protection duties within the meaning of the fourth test in 29 CFR § 553.210(a), including any ambulance and rescue activities related to medical emergencies, rather than fires, crime scenes, riots, natural disasters, and accidents.

In these circumstances, the time engaged in ambulance and rescue activities would be considered to be work performed as an incident to or in conjunction with the employees' fire protection activities within the meaning of 29 CFR § 553.212(a), and would not count in the 20 percent limitation on nonexempt work.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

(9)

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-266

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,

v.

JOHN D. WEST, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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No. 98-266
In The
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ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,
v.
JOHN D. WEST, ET AL.,
Respondents,
UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

A. The application of the exemption.

1. The United States and Respondents[1] maintain that the 29 U.S.C. § 207(k) exemption is unambiguous, and the case law consistent, and, in any event, they deem the issue one of "limited general significance," that presents a "fact-intensive law-application question that arises at the outer margin of that provision." West Br. in Opp. 7, 18. Their contentions are belied by the numerous states, local governments and national governmental organizations that have joined to file amici briefs

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[1]When referred to collectively, the United States and the Respondents are called "Opponents" herein.

urging this Court to grant review, as well as by the myriad judicial opinions attempting to interpret the law. Indeed, the need for review and clarification is perhaps best illustrated by the United States' tortuous attempt to explain its view of the exemption.[2] U.S. Br. in Opp. 8-11.

The United States says that "[r]escue service employees who spend less than 80% of their time accompanying the fire department to fire scenes are not covered by Section 7(k), even though their participation at fire scenes might be regular when such scenes occur, and even though that function at the scene of a fire might be considered integral to the operations of the fire department." U.S. Br. 9. Thus, according to the United States, while rescue and ambulance employees are "also included" in the definition of "employee[s] in fire protection activities" (where they form an integral part of the agency's activities as prescribed by 29 C.F.R. § 553.210(a)), and, while this "integral part" test is an "alternative test" to the four-part firefighter test and is clearly intended to cover rescue and ambulance employees, such employees virtually never qualify for the exemption because emergency medical services ("EMS") not rendered at the scene of a fire are "nonexempt" activities under 29 C.F.R. § 553.212(a).[3] This interpretation comports neither

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[2]The burden falls upon state and local fire chiefs to decipher and apply an exemption that the courts have labeled ambiguous, and that the enforcement authority cannot clearly explain.

[3]The United States says that EMS activities become exempt, and may exceed the 20 percent limit, if performed by someone who is "principally engaged" as a firefighter. The United States does not, however, define "principally engaged." If it intends the literal meaning of the words, *i.e.*, that firefighting must constitute the primary work, then its logic presents a conundrum; can a person continue to be "principally engaged" as a firefighter if he spends the bulk of his time performing EMS (which, as the statistics in this case and nationwide show, is the reality for firefighters)?

with congressional intent nor the language of the regulations issued by the Department of Labor (the "DOL"), and it highlights the degree of operational interference with public safety caused by the lower courts' construction of the exemption.

2. In their attempts to justify the decisions below, and to create consistency from the patchwork of § 207(k) decisions, Opponents rely, in part, on facts not established. For example, Respondents state that "Anne Arundel County EMTs are *not* employees who have 'legal authority and responsibility to engage in the prevention, control or extinguishment of a fire.'" West Br. 9 (emphasis in original). Respondents *conceded* in the district court, however, that they met the first three factors of § 553.210's four-part test, and thus conceded they have the legal authority and responsibility to engage in the prevention, control or extinguishment of fire (factor three). App. 13a (the district court stated that, "[a]t the outset, plaintiffs have conceded that the County has met its burden of proving that they satisfy the first three factors of § 553.210.").[4]

Similarly, Opponents argue that factual differences between *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 557 (1997), *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), and the case at bar justify the different

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[4]The Opponents repeat one sentence of the Court of Appeals' opinion - that Respondents "generally did not - and could not - fight fires." App. 91a. Aside from the inherent contradiction in this remark, it was the district court that made the factual findings in this case, and it found, based on Respondents' own affidavits, that they engaged in some firefighting. Findings of fact made by the district court bind the appellate court, unless the appellate court declares them to be clearly erroneous. Here, the appellate court affirmed the district court. Fed. Rule Civ. Proc. 52(a); *see Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

outcomes (although they do not explain why the tests for exemption are also different in the various circuits). Respondents assert that "in both cases the employees' predominant activities were . . . 'fire protection activities.'" West Br. 10. As explained below, however, the facts of *Christian* and *Bond* show that the paramedics in those cases spend most of their time on what the Fourth Circuit termed a nonexempt activity -- "[m]edical services which are not rendered at the scene of any fire. . . ." App. 90a.

In *Christian*, total fire alarms and car accident calls *combined* made up *less than 20 percent* of the paramedics' total calls; the rest were medical emergencies and other types of accidents. *Christian*, 108 F.3d at 931. Those paramedics responded to merely 50 percent of the fire alarms each year. The paramedics in *Christian* had such a limited association with fire protection that the district court concluded they neither had the legal duty and responsibility to fight fires, nor performed activities concerned with fire suppression and prevention. Thus, under the Fourth Circuit's holding in the instant case, the *Christian* paramedics could not qualify for the exemption.

Moreover, Respondents claim that *Nalley v. Mayor of Baltimore*, 796 F. Supp. 194 (D. Md. 1992), and the case at bar are virtually identical, and that "*Christian*'s approving citation of *Nally* [sic] and its recognition of the difference between the situation there and the situation in *Nally* (and here) belies the claim that *Christian* and the instant case are in conflict." West Br. 14. Respondents fail to mention, however, that the portion of the *Nalley* opinion cited in *Christian* diverges completely from the *West* opinion. *Compare Nalley* at 200 and *West* at App. 13a-15a. In *Nalley*, the court found that Baltimore City's single-role paramedics did not meet § 553.210's four-part test, and thus found that "[o]n this basis alone, therefore, plaintiffs deserve summary judgment." *Nalley*, 796 F.Supp. at 200. The

court made no such finding in *West*, because the factual circumstances were different.[5]

In *Bond*, the paramedics were single-role paramedics, with no fire suppression training, who spent little time responding to fires. The court found that "[t]he primary role of the EMS employee is to tend to the medical needs of the patient." *Bond*, 939 F.2d at 286. Again, under the Fourth Circuit's view (that medical services not rendered at the scene of a fire do not qualify as exempt activities), they, too, would fail to qualify for exemption.[6]

Finally, the discussions of the regulations in this case have been limited to the first paragraph of each, however, the regulations should be viewed as a whole. Section 553.210(c), for example, specifically excludes from the exemption "the so-called 'civilian' employees of a fire department . . . who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc." App. 108a. This paragraph supports the conclusion that the exemption was intended to cover the uniformed, sworn public

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[5]It was not disputed in this case that Respondents were trained and sworn uniformed firefighters, that they all received training in rescue, that they are automatically dispatched together with suppression division employees to *all* emergency calls received by the County involving fires (except for very minor incidents such as dumpster fires) accidents, hazardous materials spills and rescues, and that they occasionally performed some fire suppression functions.

[6]Moreover, the Fifth Circuit in *Bond* relied on a DOL Letter Ruling dated October 9, 1987, which states that an EMT need not be trained in fire suppression or evacuation procedures (much less actually perform them) to be engaged in activities which are "substantially related" to firefighting. *Bond*, 939 F.2d at 287-88.

safety employees who actually respond to emergencies (such as Respondents), but not the "civilians" who render support services.

3. The basis for the Court of Appeals denial of the exemption in this case was the 80/20 rule of § 553.212(a), which, the court found, imposes an "across-the-board limitation on the amount of non-firefighting work that employees may perform." App. 89a. The opposition briefs, in quoting § 553.212, conspicuously omit the example used by the DOL to illustrate what nonexempt work means: "[f]or example, firefighters who work for forest conservation agencies may, during slack times plant trees and perform other conservation activities unrelated to their firefighting duties." This is the type of work that the DOL considered neither "incident to [n]or in conjunction with" their exempt activities. The regulation was intended to apply to work that is "distinct from and unrelated to" the exempt work, *see Schmidt v. County of Prince William, Va.*, 929 F.2d 986, 990 (4th Cir. 1991), and should be defined in accordance with the Congressional intent to include rescue and ambulance employees under §207(k).[7]

4. Opponents seek to prevent the Court's review of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which essentially leaves the protection of state sovereignty to the political process. At the same time, they argue against application of the plain statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which, in light of *Garcia*, serves to ensure that congressional deprivations of state

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[7]Section § 553.212(b) permits employees to volunteer employment, provided it is "in a different capacity from their regular employment." The DOL has determined that, for paramedics who have some training as firefighters, firefighting work is not work "in a different capacity." *See* DOL Letter Ruling issued February 7, 1989.

sovereignty are, at a minimum, intentional, and not inferred from ambiguous legislation.[8] In essence, Opponents contend that the reverse approach is proper; that the County must bear the burden of proving the applicability of the exemption, and that, if there is doubt as to its applicability, the law must be narrowly construed against exemption.

Despite Opponents' protestations to the contrary, however, *Gregory* is precisely on point: the Age Discrimination in Employment Act ("ADEA"), the statute at issue in *Gregory*, was largely modeled after the FLSA, *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); the ADEA plainly covers all state and local government employees, under a definition similar to that found in the FLSA, *see* 29 U.S.C. § 630(f) and 29 U.S.C. § 203(e); and it makes no mention of judges in the exemption at issue. Indeed, the case for application of the plain statement rule is stronger in the case at bar than in *Gregory*, as the intent of Congress to include rescue and ambulance employees is demonstrated in both the legislative history and the DOL's regulations.

Opponents argue that the plain statement rule should not be applied in this case because "Congress would be forced to draft legislation at a level of excessive detail" (U.S. Br. 17), and because "Congress has clearly stated its intent" that state and local employees be covered and "the only question here . . . is *which* provision of the FLSA covers respondents." U.S. Br. 17 (emphasis in original). These arguments, however, mirror those

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[8]The United States asserts that the County first raised the plain statement argument during its Motion for Rehearing below. In fact, the County briefed and argued the legislative intent and constitutionality issues below, and raised the *Gregory* plain statement rule at oral argument below.

of the dissenting portion of Justice White's opinion in *Gregory*, which this Court did not adopt.[9]

B. The Constitution and the application of the FLSA

Opponents rely on *Garcia* and the doctrine of *stare decisis* in arguing against review of the constitutional issue in this case.[10] As this Court has repeatedly stated, however, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Further, the doctrine has only limited application in the field of constitutional law, where flexibility is necessary to permit the Constitution to adapt to the circumstances of changing times, *see New York v. United*

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[9]In Justice White's opinion in *Gregory*, he opined that "Congress . . . will be forced to draft long and detailed lists of which particular state functions it meant to regulate," *Gregory*, 501 U.S. at 478, and "[i]n the present case . . . Congress has expressly extended the coverage of the ADEA to the States and their employees. . . . The only dispute is over the precise details of the statute's application". *Gregory*, 501 U.S. at 476.

[10]The County submits that *Garcia*'s holding has been more broadly interpreted than the wording of the opinion warrants, and that this Court can find the FLSA unconstitutional as applied in this case without infringing upon the actual holding of *Garcia*, which concerned application of the FLSA to a largely federally-funded mass transit operation, and did not involve integral public safety functions. *See Garcia*, 469 U.S. at 553, 554-56. The Court further clarified the limits of *Garcia* by stating that "[t]hese cases [involving SAMTA] do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* at 556, *citing Coyle v. Oklahoma*, 221 U.S. 559 (1911).

States, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting, joined by Black, J.). This case involves what is "perhaps our oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992).

Further, *Garcia* is anything but longstanding precedent. It is a bare majority decision, of relatively recent vintage, which resulted from the Court's decision to disregard the *stare decisis* doctrine. Contrary to Respondents' argument that *Garcia* has brought "order and predictability" to the law, what is predictable under *Garcia* is the continuation of the barrage of litigation it engendered, resulting in the imposition of enormous fiscal liabilities on state and local governments. A simple computer search of Federal Reporters and Federal Supplements between 1985 and 1998 found approximately 160 reported opinions in federal FLSA lawsuits against states, local governments and their officials, and this number does not include matters that were settled prior to or during litigation, unreported opinions, or state court suits.

Respondents characterize the principle set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled by *Garcia*), as "an unworkable dichotomy." West Br. 22. This is the same principle, however, that the United States described, in arguing the *Garcia* case, as "carefully delimited," "carefully tailored," "a structured and workable framework," "sound and enduring," and "in harmony with the fundamental principle of federalism embodied in the Constitution." U.S. Supp. Br. 2, 8; U.S. Reply Br. on rearg. 2, 4, 10.

For the foregoing reasons, and those given in the petition, the County respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, ET AL.,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do "fire protection activities" under the Fair Labor Standards Act include emergency medical services when a local government operates its fire and rescue service with medical services provided as an integral part of the fire and rescue service?

2. Is a local government better able than the federal government to define the scope of fire protection services?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr.; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Ann Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.; Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.; Dawn Rodriguez; David R. Klinger;

William H. Phillips; Bruce E. Fritz; Charles Edward Yetter; R. Thomas Crow II; Debbie Schueler; William A. Cooper, Jr.; Steven K. Frye; Michael C. Huffman; Joseph M. Jordan; David James Geslois; Russell E. Davies, Jr.; Erick A. Esker; Donald Weigel; Ralph David Ritchie; Kenneth S. Banke; Jeannie Squillaci; Harry Joseph Joyave; Michael B. Ladd; William L. Bethea III; John E. Lamb; Daniel T. Woolston; Patrick J. Carmody; Clarence Gerard Hayes; Brett J. Howe; D. Depriest; John G. Alexander; Steven P. Ambrozowicz; Daniel F. Bowen; Claudia L. Clark; Susan E. Egan; Stephen Scott Feilinger; James Edward Harsh; Sarah Lefler; John Duffy McAnallen; Robert O'Brien; Michael F.X. O'Connell, Jr.; Anthony J. Pugliese; Edward Joseph Ross III; Randall W. Corbel; Kenneth T. Claypool; John A. Covington; John N. Dennett; George F. Dickey; Stephanie Sheinbach Dietz; Roland Fink, Jr.; Walter A. Ford, Jr.; Jeffrey L. Orye; Kenneth L. Pardoe; Keith A. Lefler; James L. Kidwell; Thomas A. Pezza; David A. Badwak; Douglas Bosley; Thomas R. Butler, Jr.; and Michael P. Henry. The United States of America is an Intervenor. Montgomery County, Maryland, is an *amicus curiae*.

CORPORATE DISCLOSURE

Montgomery County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Montgomery County, Maryland, and as such has no corporate parents or subsidiaries.

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Montgomery County, Maryland, respectfully supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab. Cas. P33,647, 4 Wage and Hour Cas. 2d (BNA) 641 (Feb. 18, 1998) (No. 96-1280, 96-1251). The opinions of the district court are unreported. All of these opinions appear in the appendix to the petition filed by Anne Arundel County.

JURISDICTION

The court of appeals has entered its judgment, which this Court may review by issuing a writ of certiorari to exercise jurisdiction of this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *amici curiae* adopt the provisions set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Montgomery County is a political subdivision of the State of Maryland and exercises the powers of local government and home rule provided by the Maryland Constitution. Md. Const. art. XI-A; Md. Ann. Code, Art. 25A (1998). The County provides fire and rescue services to its community.

Even when the FLSA was amended to apply to firefighters, the duties of the local fire department included non-fire tasks. Fire personnel were as likely to be called to a fire as they were to help remove raccoons that had entered a home or to bail water from a flooded basement. Whatever the emergency, citizens were likely to call the fire department first. This multifaceted role of helping the community in any emergency situation has become more focused, and fire and rescue services twenty years later include fire suppression, hazardous materials, urban search and rescue, and emergency medical services. As the needs of the community have expanded, so have the training and services associated with fire protection. Recognizing these needs, Montgomery County trains its fire and rescue employees not only to extinguish fires, but also to provide emergency medical assistance and to employ rescue techniques in a variety of situations.

The scope of fire protection services has evolved to include emergency medical care as an integral part of providing safety to the neighborhood. Fire prevention has become the focus of fire and rescue services, with the goal of eliminating fires by installing fire sprinklers and ensuring early detection by using smoke detectors. The reduction in fires in recent years is a reflection of the success of the mission pursued by the fire and rescue service.

An indirect result is that fewer fire and rescue service personnel respond to actual fires—regardless of whether they are firefighters or emergency medical providers. On the other hand, many responses include both firefighters and medical personnel. Even a car accident, which may require only medical treatment, generates response by firefighting personnel and equipment along with emergency medical vehicles and

personnel. Similarly, a fire department would be hindered greatly without having firefighters available who are trained to provide emergency medical services. Each aspect of these "fire protection services" are integral to the local fire and rescue services. The plain meaning of the FLSA recognizes these activities as parts of a whole rather than independent functions.

REASONS FOR GRANTING THE PETITION

To achieve complete fire protection, Montgomery County has chosen to train all personnel as firefighters and emergency medical technicians, while many personnel also obtain advanced training in these areas. This means that all personnel may be assigned to firefighting tasks, while those with the additional training may be assigned to firefighting tasks or emergency medical tasks or some combination of the two. Regardless of the particular assignment, these employees work together on the same shifts and respond from the same fire station—often to the same incidents, whether fires or personal injuries. The court of appeals failed to recognize the symbiotic relationship of these duties, despite the recognition of these functions by the FLSA as exempt public safety functions.

This Court should hear this case to clarify the ability of a local government to establish a fire and rescue service that includes emergency medical services as an integral part of the operation, without fear that the performance of emergency medical services will be calculated as a non-exempt function. The reference to the term "fire protection services" must be interpreted to include functions other than firefighting, and this Court can clarify the scope of that phrase. Moreover, principles of federalism support the authority of local governments to

determine what fire protection tasks are sufficiently interrelated that they qualify as exempt functions.

I.
THE FLSA ACCOMMODATES THE HISTORICAL EVOLUTION OF FIRE PROTECTION SERVICES

In 1973, the National Commission on Fire Prevention and Control issued a report on fire safety in the United States. As a result of the recommendations in the report, the National Fire Academy was established. The NFA works to enhance the ability of fire and emergency services and allied professionals to handle fire and related emergencies more effectively. The NFA does not distinguish between fire and non-fire emergencies, but provides training to address the various possibilities facing today's fire protection personnel.

In addition to recommending increased fire prevention activities and fire safety education, the Report of the Commission also recognized that emergency ambulance and paramedical service met the criterion of utilizing a firefighter's special capabilities. *America Burning*, The Report of the National Commission on Fire Prevention and Control, p. 38 (1973). The Report further recognized that the firefighters might respond to non-fire emergencies and that combining firefighting and paramedic services was efficient and would enhance the value of the fire department. *Id.*

Consistent with the Report, Montgomery County describes the duties within the scope of the Fire and Rescue Service to include fire, rescue, and emergency medical services and training. These systems are designed to ensure that fire and rescue personnel work together in an integrated manner. As a

practical matter, this makes sense. When a 911 call is received, a variety of services may be required—fire suppression, rescue, and/or emergency medical services. Of this group of personnel, no one knows whether or for how long they will be needed at the scene when they arrive, yet all are part of the minimum staffing provided by the respective counties.

The court of appeals' view that a public safety employee must engage in fire suppression for 80% of their on-duty time creates an artificial distinction between the responsibilities of fire protection personnel. No doubt, there are duties that realistically fall within the non-exempt category. For example, a fire officer who handles training or who handles disciplinary actions may be performing non-fire protection activities for more than 80% of their assigned duties. These duties fit within the typical desk jobs for which the public safety exemption does not apply.

The situation differs when fire and emergency medical personnel work in the same station, handling the same housekeeping tasks, while awaiting and often responding to the same calls. The fundamental nature of these tasks is to be on standby and to respond quickly when someone has called for emergency help. When the personnel have been trained interchangeably and may be assigned to interchangeable tasks, there should be no distinction between how many fires each individual responded to within a certain period. That result would interfere with the right of management to choose where to assign its employees. Moreover, this type of characterization would ignore the non-fire emergencies to which the public expects fire personnel to respond, such as a car accident involving personal injuries but no fire.

The distinction only makes sense when it is made between those employees working at the fire station and those in an office setting, such as the headquarters. Any attempt to treat firefighters and the emergency medical personnel who accompany them differently conflicts with the intent of the FLSA and with the longstanding practice of fire companies.

The proper interpretation of "fire protection activities" recognizes that rescue and ambulance service is included in these activities as long as the functions are an integral part of the fire protection activities—this view does not require measurement of the percentage of fires compared to the number of other emergencies, but contemplates a cohesive system that provides the services. *See e.g. Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir. 1997); *Bond v. City of Jackson*, 939 F.2d 285 (11th Cir. 1991).

In *Christian, supra*, the court of appeals acknowledged that firefighting and emergency medical services are indistinguishable under the FLSA, so that "[p]roviding paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job." 108 F.3d at 934. Similarly, in *Bond*, the court recognized the Department of Labor's explanation that the exemption in the FLSA § 207(k) includes rescue and ambulance personnel that are an integral part of the fire service, and has required only that they be dispatched regularly to fires or accidents—no percentage of each type of emergency has been required. 939 F.2d at 287.

Non-exempt work includes clear non-fire protection activities, such as, forest firefighters who plant trees, labor

relations officers, training officers and other non-fire protection tasks. Emergency medical services, however, are every bit as incidental and integral to fire protection activities as the maintenance of equipment and housekeeping functions that fill the time awaiting the next emergency call. In fact, emergency medical services can no more be segregated from fire protection activities than the rescue efforts performed by fire personnel.

II.

THE STATES AND LOCAL GOVERNMENTS ARE BETTER ABLE THAN THE NATIONAL GOVERNMENT TO IDENTIFY AND PERFORM ACTIVITIES THAT DO NOT INVOLVE INTERSTATE COMMERCE

The provision of fire protection services historically has been a local function. The application of the FLSA to this inherently local service interferes with the counties' authority to provide these services to the community and further interferes with validly negotiated agreements between the local government and its emergency personnel. To permit the FLSA to impact a local government's operations in this way violates constitutional principles of federalism.

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this Court recognized its analysis in *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia, supra*, where this Court emphasized that fire prevention activities are "remote from any normal concept of interstate commerce, . . . [and] that [they] epitomize the concerns of local, democratic self-government. . . ." *Id.* at 575-76. This Court further concluded that the states and local governments were better able to perform these functions than

the federal government. *Id.* Certainly, this view verifies the local nature of fire and rescue services and, in turn, precludes an interpretation that would include these activities within the scope of interstate commerce.

This interference cannot realistically be compared to that of private companies, because those companies are not entitled to the protections that a local government receives under principles of federalism. To allow the court of appeals to interfere with an admittedly local function by its overly narrow statutory interpretation conflicts with prior holdings of this Court. No dispute exists as to whether the provision of fire protection services remains a function of local government. Yet, the court of appeals' decision severely affects the provision of these services by increasing the cost of providing emergency medical services due to alternate work schedules or overtime compensation. In addition, the court of appeals' decision effectively nullifies the existing agreements that have been negotiated with fire protection personnel in a way that private companies do not experience.

This artificial distinction ignores the inherently local nature of these functions and allows an unwarranted level of interference by the federal government. The FLSA does not provide for the differences between the various organizations within a particular state, let alone contemplate the many diverse methods throughout the country for providing fire protection. Interstate commerce suffers no harm from the exclusion of local governments from this aspect of the FLSA, yet the local governments lose control of one of their most significant functions if the court of appeals' decision remains unaddressed.

CONCLUSION

For the foregoing reasons, along with those set forth in the petition filed by Anne Arundel County, Montgomery County requests that this Court issue a writ of certiorari to consider this case.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,
v.
JOHN D. WEST, *et al.*,
Respondents,
UNITED STATES OF AMERICA,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL GOVERNORS' ASSOCIATION, JOINED BY THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner and the United States have consented to the filing of this brief. This motion is made necessary by the refusal of respondents to give unconditional consent to the filing.

Amici are organizations whose members include state, county, and municipal governments and officials

throughout the United States. This case presents a question of extraordinary importance to state and local governments throughout the United States—whether the Fair Labor Standards Act mandates that local governments pay overtime on the basis of a forty hour workweek to fire department employees who engage in fire protection activities but who are also called upon to provide emergency medical services.

The court of appeals held that the FLSA's partial overtime exemption for employees engaged in fire protection activities, *see* 29 U.S.C. § 207(k), does not apply to respondents. The court so held notwithstanding the district court's finding that respondents are "employed by an organized fire department," have met the training requirements for firefighters under state law, have "legal authority and responsibility to engage in the prevention, control or extinguishment of a fire," and "perform[] activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires." 29 C.F.R. § 553.210(a); *see* Pet. App. 13a-15a. Instead, the court of appeals, relying on the Department of Labor's 80/20 rule, reasoned that respondents' activities as EMTs are not "integrally relate[d] to the Fire Department's fire protection activities" because "EMTs perform mostly medical services and work related to medical services." Pet. App. 89a-90a.

In furtherance of the fundamental purpose of protecting public safety, most local governments throughout the United States have established emergency medical services teams, assigning them to their fire departments. Like Anne Arundel County, *see* Pet. 3, most local governments cross-train their fire department personnel to respond to both firefighting and

medical emergencies. Indeed, in Anne Arundel County, as in most jurisdictions, medical emergencies predominate among the calls to which fire department personnel respond. *Id.* at 3, 11-12.

The holding below subjects local governments within the Fourth Circuit to crippling overtime liability and could force local governments to substantially curtail the range of emergency medical services they provide. It also creates a conflict with the holdings of the Fifth and Eighth Circuits, creating uncertainty for the numerous local governments in the circuits which have yet to address the issue. Because of the importance of this issue to *amici* and their members, *amici* respectfully move for leave to file the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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November 3, 1998

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services.

2. Whether the Fair Labor Standards Amendments of 1974 violate the Tenth Amendment and the Constitution's structural framework of dual sovereignty by (a) directing the functioning of state and local government public safety operations and (b) interfering with the provision of essential local emergency services.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL GOVERNORS' ASSOCIATION, JOINED BY THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.[1]

STATEMENT

Amici adopt petitioner's statement.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three reasons. First, the Fourth Circuit's holding is in direct conflict with the holding of the Fifth and Eighth Circuits on an issue of utmost importance to local governments throughout the nation. *See Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 557 (1997); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991). Public employers and their employees are thus in urgent need of this Court's guidance.

Second, the Fourth Circuit's interpretation of the Department of Labor's regulations renders a nullity the Section 207(k) exemption for the majority of local governments which provide EMS services. The consequence of the Fourth Circuit's mandate that local governments pay overtime on the basis of a forty hour workweek will lead to substantial monetary liability and could force local governments to substantially alter the scope of the emergency medical services they provide. The issue is thus one of exceptional national importance.

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[1] Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and that no person or entity, other than the *amici* and their members, made a monetary contribution to the preparation and submission of the brief.

Third, the evolution of Tenth Amendment jurisprudence since *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), establishes that the commerce clause does not provide Congress with unlimited power vis-a-vis the States. This case presents an appropriate opportunity to resolve a question of fundamental importance to the federal system which was not at issue in *Garcia*—whether the States surrendered to the Federal Government power under the Commerce Clause to regulate them in the performance of their public safety functions.

I. THE COURTS OF APPEALS ARE IN CONFLICT ON THE ISSUE OF WHETHER EMS PERSONNEL ARE SUBJECT TO THE FLSA'S SECTION 207(k) EXEMPTION

The Fourth Circuit's holding is in direct conflict with the holdings of the Fifth and Eighth Circuits that fire department EMS personnel are subject to the Section 207(k) overtime exemption for employees engaged in fire protection activities. *See Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 576 (1997); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991).

In *Bond*, the Fifth Circuit held that EMS personnel of a fire department were engaged in fire protection activities under Section 207(k), notwithstanding that they were "not trained firefighters" and that their "primary role" was "to tend to the medical needs of the patient." 939 F.2d at 286. In determining whether the EMS employees were engaged in "fire protection activities," the court did not look to the 80/20 rule. *See id.* at 287-88. Instead, it relied on the language of 29 C.F.R. § 553.210(a) stating that " '[t]he term ['employment of any employee in fire protection activities'] would also include rescue and

ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See [§]553.215.'" *Id.* at 288. The court also relied on a DOL Wage and Hour Division Letter Ruling interpreting § 553.215 as imposing only two requirements for the exemption. *Id.* at 287-88. These are (1) that EMS employees have "received training in the rescue of fire and accident victims" even if they do not routinely perform such rescues and (2) that they be "dispatched regularly to fire and accident scenes." *Id.* at 288.

In *Christian*, paramedics cross-trained as firefighters sued their municipal employer, seeking overtime pay for hours worked in excess of forty per week. 108 F.3d at 930-31. The district court held that the paramedics did not satisfy the four-part test of 29 C.F.R. § 553.210(a). *Id.* at 932. The court further held that the employees did not meet the alternative test for rescue and ambulance personnel, which requires that they "form an integral part of the public agency's fire protection activities," 29 C.F.R. § 553.210(a), because the employees "spent more than 20% of their time on activities unrelated to firecalls." 108 F.3d at 933.

The Eighth Circuit reversed. The court first noted that the employees met the four-part test of 29 C.F.R. § 210(a) because they were "sworn firefighters" and "respond to every fire alarm where a fire has been confirmed." 108 F.3d at 932. As the Eighth Circuit reasoned, "[t]he four-part test has no requirement that firefighting be the employees' only or primary duty, and the fact that the paramedics are also able to provide medical services while at fires and elsewhere does not eliminate their responsibility for firefighting." *Id.*

The Eighth Circuit then turned to the district court's application of the 80/20 rule and its conclusion that more than twenty percent of the paramedics' activities were unrelated to fire protection activities because it was "spent on accident and emergency medical calls other than fires or car accidents." *Id.* at 933. The court rejected the district court's approach, noting that it was inconsistent with the purpose of the exemption and several Department of Labor Letter Rulings. *Id.* at 934. In the view of the Eighth Circuit, "[p]roviding paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of the [paramedics'] duties or cause them to perform tasks unrelated to their job." *Id.* The Eighth Circuit thus held that "Section 553.212 does not apply here to defeat the partial overtime exception for the paramedics." *Id.*

The analysis and holdings of the Fifth and Eighth Circuits thus squarely conflict with the Fourth Circuit's holding "that 29 C.F.R. § 553.212(a) directs the conclusion that EMTs are not employees engaged in 'fire protection activities.'" Pet. App. 89a. The Fourth Circuit reasoned that petitioner's EMTs "do not qualify as fire protection employees because they exceed [the] twenty percent limit." *Id.* at 90a. Under the Fourth Circuit's approach, "[m]edical services which are not rendered at the scene of any fire do not qualify as exempt activities." *Id.* In the Fourth Circuit's view, petitioner's "EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters." *Id.*

There is thus an intolerable conflict between the courts of appeals on an issue of vital importance to

numerous local governments throughout the country. Allowing additional cases to percolate in the lower federal courts will only further confuse the state of the law. The Court should therefore grant the petition for a writ of certiorari.

II. THE FOURTH CIRCUIT'S HOLDING RENDERS A NULLITY AN FLSA EXEMPTION OF EXCEPTIONAL IMPORTANCE TO LOCAL GOVERNMENTS

In response to the increased expectations of their citizens for emergency medical services, numerous local governments throughout the United States have created EMS units. Most local governments have assigned EMS units to their fire department because it has "a sizable body of reliable, trained, and disciplined personnel, operating within an existing command structure, possessing vehicular and communications resources, operating from structural facilities located throughout the community, and holding the confidence of the public." International City Management Association, *Managing Fire Services* 351 (Ronny J. Coleman & John A. Granito eds., 2d ed. 1988). In addition, local governments recognized "that most firefighting personnel were actually engaged in emergency activity for only a small percentage of their local available on-duty time." *Id.*

Fire departments are thus the principal providers of EMS throughout the United States. *See id.* at 350. Most significantly, EMS calls commonly comprise the majority of emergency calls answered by fire departments. *See id.*; *see also* Kevin Roche & Marisa E. Campbell, *The National Run Survey 1996*, Firehouse 94-98 (June 1997) (breaking down fire department calls for 216 local governments). As a study of Cali-

fornia's fire departments found, "67.5 percent of all emergency calls answered by California fire departments are EMS-related." *Managing Fire Services* at 350.

The court of appeals' holding effectively renders the Section 207(k) exemption a nullity for most local governments. Not only does the court's holding expose local governments to massive liability for overtime and liquidated damages, it also jeopardizes the ability of local governments to provide emergency medical services to their citizens.

In many jurisdictions, firefighters traditionally spent substantial amounts of unproductive time waiting for the next firecall. As "there is little justification for limiting full-time paid firefighters to the single role of firefighting," *Managing Fire Services* at 370, local governments have commonly cross-trained their firefighters to provide EMS services. As in this case, where "at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all," Pet. App. 90a, EMS calls predominate in most fire departments. *See Managing Fire Services* at 350; *The National Run Survey* at 94-98. The Department of Labor's 80/20 rule thus exposes most fire departments in the country to crippling liability for overtime and liquidated damages. It renders the Section 207(k) overtime exemption a dead letter for these departments.

In enacting the Section 207(k) exemption, Congress recognized that it is inappropriate to apply the FLSA's forty hour workweek overtime standard to uniformed firefighters. *See* House Conf. Rep. No. 953, 93d Cong., 2d Sess. (1974), *reprinted in* 1974

U.S.C.C.A.N. 2862, 2864. As the Conference report explained, "the standard FLSA 'hours of work' concept [is] directed primarily at industrial and agricultural occupations" and does not "reflect[] the uniqueness of the firefighting service" which has customarily used the "tour of duty" concept. *Id.* Whether employees of fire protection agencies are employed solely as firefighters or as cross-trained EMTs, the nature of their work is the same: protecting public safety by preparing for, and waiting to respond to, a call for emergency services.

The court of appeals' construction of the DOL regulations—particularly its reliance on the 80/20 rule to conclude that the activities of Anne Arundel County's EMS personnel are not "integrally relate[d] to the Fire Department's fire protection activities"—is contrary to Congress' purpose of exempting these employees from the forty hour workweek overtime standard. Section 207(k) is clear on its face; if fire department employees engage in fire protection activities, as respondents plainly do, they are subject to the partial overtime exemption. *See* 29 U.S.C. § 207(k).

The court of appeals' holding amounts to no more than a bare bones conclusion. It ignores the numerous facts which demonstrate that respondents' activities "integrally relate to the Fire Department's fire protection activities," *see* Pet. App. 89a, and that respondents "form an integral part of the [county's] fire protection activities." 29 C.F.R. § 553.210(a). These include:

1) that the County's EMS personnel have been trained as firefighters;

2) that they are designated as firefighters;

3) that they are assigned to the County's 30 firestations;

4) that they work the same shifts and are integrated into the same command structure as other firefighters; and

5) that under the County's "first responder" policy, any firefighter may be dispatched to render emergency medical care or to the scene of a fire, accident or other emergency.

See Pet. 3-4.

In short, if Anne Arundel County's EMS personnel do not "form an integral part of the public agency's fire protection activities," 29 C.F.R. § 553.210, then few, if any, of the numerous local governments throughout the country which use cross-trained personnel are entitled to the exemption. The Court should therefore grant the petition to correct the Fourth Circuit's manifestly erroneous interpretation of Section 207(k).

III. THE COURT OF APPEALS' HOLDING UNDULY INTRUDES ON THE STATES' PUBLIC SAFETY FUNCTIONS IN A CONSTITUTIONALLY IMPERMISSIBLE MANNER

The Fourth Circuit's holding has grave consequences which go beyond the considerable monetary judgment it affirmed. The court's holding will cause local governments to alter their existing response procedures to protect against the incurrence of overtime liability, re-organize their departments, and/or reduce the level of EMS they provide. The intrusiveness of the Fourth Circuit's holding, taken together with this Court's recent Tenth Amendment jurisprudence, demonstrate that this is an appropriate case to

clarify the scope of the holding of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Amici are mindful of "the central importance of *stare decisis* in this Court's jurisprudence." *Hilton v. S.C. Public Rys. Comm.*, 502 U.S. 197, 201 (1991). The Court's recent Tenth Amendment cases, however, have properly called into question the continuing vitality of *Garcia*'s holding that the States must rely on Congress, and not the Court, for protection from all unduly intrusive exercises of the commerce power. *See, e.g., Printz v. United States*, 117 S.Ct. 2365, 2383 (1997) (questioning validity of "the incidental application to the States of a federal law of general applicability [that] excessively interfered with the functioning of state governments"); *New York v. United States*, 505 U.S. 144 (1992).

Moreover, the Court has recognized that there are indeed judicially enforceable limits to the commerce power. *See United States v. Lopez*, 514 U.S. 549 (1995). As the Court recently observed, "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz*, 117 S.Ct. at 2376 (quoting The Federalist No. 39, at 245 (James Madison)). The Framers envisioned a constitutional structure in which "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (J. Madison) (Isaac Kramnick ed., 1987). *See also Lopez*, 514 U.S. at 552. *Amici* therefore respectfully submit that it is appropriate for the Court to revisit *Garcia* to determine whether the commerce power authorizes Congressional regulation of the

States' public safety function or whether this function is part of the residuary and inviolable sovereignty retained by the States in forming the Union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 1998

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AMICI CURIAE BRIEF OF PRINCE GEORGE'S COUNTY, BALTIMORE CITY, ST. MARY'S COUNTY AND WORCESTER COUNTY, MARYLAND, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the courts below erroneously applied the incorrect standards, in direct conflict with other circuit courts of appeal, for determining whether emergency medical personnel qualify for the partial exemption provided by §7(k) of the Fair Labor Standards Act?

II. Whether the application of the Fair Labor Standards Act to State and local government violates the Constitutional principles of federalism and constitutes an impermissible intrusion by the Federal Government into the core functions of State and local governments?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland.

Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr.; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Ann Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.; Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James

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The United States of America is an Intervenor.

Prince George's County, Baltimore City, St. Mary's County and Worcester County, Maryland, are *Amici Curiae*.

CORPORATE DISCLOSURE

Baltimore City, Prince George's County, St. Mary's County and Worcester County, Maryland are bodies corporate and politic, organized under the laws of the State of Maryland. None of the foregoing political subdivisions of the State of Maryland has corporate parents or subsidiaries.

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Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6(a)(1), 88 Stat. 55 (1974) (codified as amended at 29 U.S.C. §203(e)(2)(C) (1994)) 15,16

Md. Const. Art. XI-A 4

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Md. Ann. Code, Art. 25 (1998) 4

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Md. Ann. Code, Art. 25B (1998) 4

Other Material:

The Federalist No. 45 (J. Madison) (J. Cooke ed. 1961) 14,15

Prince George's County, Baltimore City, St. Mary's County and Worcester County, Maryland, respectfully support the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTEREST OF THE AMICI CURIAE

Prince George's County, Baltimore City, St. Mary's County and Worcester County constitute a cross-section of political subdivisions of the State of Maryland. Two — Baltimore City and Prince George's County — are among the most populous political subdivisions of Maryland. They are metropolitan/suburban in nature, with strong executive governments, a public charter that functions as a local "constitution" and considerable home rule/local autonomy. St. Mary's County and Worcester County (located in the most southern part of Maryland's Western Shore and the most eastern part of Maryland's Eastern Shore, respectively) are predominately small town/rural and are governed by county commissions with limited local powers granted by the State.

All of the political subdivisions who address the Court through this brief contend that the Federal Government has no constitutional authority to regulate the manner in which the States and their political subdivisions exercise functions and responsibilities which are uniquely local in the scheme of federalism. The parties to this brief also assert that the Fair Labor Standards Act, as applied in the circumstances of the subject case, is unconstitutional.

Baltimore City and Prince George's County have each had to pay out considerable public funds to their emergency medical services employees to settle cases as a consequence of decisions by Federal District Judge Walter Black, interpreting §7(k) of the Fair Labor Standards Act as amended, 29 U.S.C. §207(k), including the decision which is the subject of the petition for writ of certiorari herein. [1] Prince George's County has also had to change the method by which it delivers emergency medical services within its borders, to the detriment of the methods which it believes is optimum for providing such services, which are a core function of state and local governments.

Even though St. Mary's and Worcester Counties do not at this time utilize paid emergency medical service employees as a means of performing that public health and safety function, they recognize that the intrusive federal regulation that is the subject of this case necessarily limits their future options as to the performance of their governmental functions.

In the case of Baltimore City and Prince George's County, not only have they already been adversely affected by Judge Black and the Fourth Circuit's interpretation and application of 28 U.S.C. §207(k), but also they find it particularly disturbing that, were they located in Texas or any other state in the Fifth Circuit (where the rule set forth in

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[1] Baltimore City's case is *Nally v. Mayor and City Council of Baltimore, Maryland*, 796 F. Supp. (D.Md. 1992). After the *Nally* decision was issued, the case settled. Prince George's County's case is *Hopkins v. Prince George's County, Maryland*, D. Md., Civil Action No. WMN 96-213. It too was settled, after issuance of the court of appeal's decision herein.

Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991) prevails), they would not have needed to pay out all that public money and/or would not have needed to change the way they provide emergency medical services within their borders.

In short, all of the subdivisions who are parties to this brief urge the Court to grant the petition for writ of certiorari herein, because the Constitution bars the federal government from legislating as it has done herein and because, even if the legislation were not unconstitutional, the writ is necessary because, right now, no State or local public agency can be sure what 28 U.S.C. §207(k) really means.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998). The opinions of the district court are unreported. All of these opinions appear in the appendix to the petition filed by Anne Arundel County.

JURISDICTION

The court of appeals has entered its judgment, which this Court may review by issuing a writ of certiorari to exercise jurisdiction of this case under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *amici curiae* adopt the provisions set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Baltimore City, Prince George's County, St. Mary's County and Worcester County are all political subdivisions of the State of Maryland. Baltimore City and Prince George's County exercise the powers of local government and home rule provided by the Maryland Constitution to chartered counties. Md. Const. Art. XI-A; Md. Ann. Code, Art. 25A (1998). Worcester County exercises the powers of local government and home rule provided by the Maryland Constitution to counties operating under an alternative code form of government. Md. Const. Art. XI-F; Md. Ann. Code, Art. 25B (1998). St. Mary's County exercises the general powers conferred upon County Commissioners provided by Maryland Code Annotated Article 25. At any time, St. Mary's County may elect to adopt a charter or code form of government and exercise the powers of local government and home rule provided under the respective provisions of the Maryland Constitution.

At present, all political subdivisions party to this *amicus* brief provide fire, rescue and emergency medical services to their communities. Baltimore City and Prince George's County utilize paid emergency medical services personnel, as well as paid firefighters, to provide these essential services. Both Baltimore City and Prince George's County, based upon the needs of their communities and the resources available to them, have determined what they believed to be the most effective manner in which to deliver fire protection, rescue and emergency medical services.

Both political subdivisions, however, have had to alter to some degree their methods of delivering essential fire,

rescue and emergency medical services as a result of Fair Labor Standards Act lawsuits filed against both political subdivisions and as a result of the decisions by Federal District Court Judge Black regarding §7(k) of the Fair Labor Standards Act as amended, 29 U.S.C. §207(k). One of those decisions is the case that is the subject of this petition. The application of the Fair Labor Standards Act to local governments and, in particular, to firefighters and other fire department field operations employees who perform emergency medical services has interfered with methods originally selected to provide fire, rescue and emergency medical services by those in the best position to judge the needs of the community and the resources available, that is, by the local political subdivisions themselves.

While St. Mary's County and Worcester County do not currently employ paid emergency medical services employees, the federal limitations imposed by the Fair Labor Standards Act as amended and as construed by the Fourth Circuit significantly limits future options for provision of such services.

The application of the Fair Labor Standards Act, particularly §7(k), to States and their political subdivisions has affected the manner in which these local governments schedule employees, determine pay rates, assign duties, negotiate labor contracts and fund their fire departments. Such decisions are clearly matters of local concern and the federal government's influence in these realms violates the principles of federalism guaranteed by the United States Constitution.

I.

EVEN WERE IT CONSTITUTIONAL TO APPLY THE FAIR LABOR STANDARDS ACT TO STATE AND LOCAL GOVERNMENTS, THE COURTS BELOW APPLIED THE ACT ERRONEOUSLY IN THIS CASE.

The lower courts in this case erroneously determined whether the emergency medical employees at issue qualify for the §7(k) partial exemption. Moreover, the lower courts' improper denial of the exemption has had significant deleterious effects on several local governments that fall within the lower courts' jurisdiction. The adverse effect on Prince George's County, described below, serves as but one example of the situation created by the courts' erroneous interpretation of §207(k).

A. The FLSA and the §207(k) Exemption

As a general rule, the Fair Labor Standards Act requires that an employer pay each of its employees an overtime premium equivalent to one-half of the employee's regular rate of pay for each hour that the employee works in excess of 40 hours in a workweek.[2] 29 U.S.C. §207(a)(1).

Section 7(k) of the Act, however, provides a partial exemption from the overtime premium for a public agency "with respect to the employment of any employee in fire protection activities or any employee in law enforcement

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[2] In other words, if an employee's regular rate of pay is $20 per hour, the employee is to be paid $30 per hour for each hour worked in excess of 40 in a workweek. Thus, if the employee works 60 hours in a workweek, his/her gross pay for that workweek is (40 x $20) + (20 x $30) = $1400.

activities.... " 29 U.S.C. §207(k). Where the §7(k) partial exemption applies, the fifty percent premium must be paid only to the extent that the employee's hours during a regular and recurring work period of not less than 7 or more than 28 consecutive days exceed an average of approximately 7.57 hours per calendar day for employees engaged in fire protection activities, and 6.11 hours per calendar day for employees engaged in law enforcement activities. See 29 C.F.R. §§553.224, 553.230.

Thus, for employees employed by a public agency in fire protection activities, the overtime premium would be required only if the employee, for example, worked in excess of 53 hours in a regular and recurring work period of 7 calendar days (7 x 7.57 = 53), or in excess of 212 hours in a regular and recurring work period of 28 calendar days (28 x 7.57 = 212). See 29 C.F.R. §§553.224, 553.230.

The Department of Labor has issued regulations defining what is meant by the term "employee in fire protection activities" for purposes of the §7(k) exemption. Section 553.210(a) of Title 29 of the Code of Federal Regulations provides a four-part test. However, §553.210(a) also provides that "the term [employee in fire protection activities] would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215."

B. The Deleterious Effects Suffered By Prince George's County as a Result of the Lower Courts' Interpretation of the § 207(k) Partial Exemption

In the case of Prince George's County, employees employed in fire protection activities had a regular work

schedule of 24-hour tours of duty on 7 days during a work period of 28 consecutive days. On the basis of a traditional workweek of 7 days, the employees worked 48 hours (2 days) during three of the weeks and 24 hours (1 day) during the fourth week. Under the §7(k) partial exemption, no overtime premium would be due because the employee would work only 168 hours in a 28-day work period. However, without the §7(k) exemption, the employee would be entitled to a fifty percent overtime premium for 24 hours worked during the 28-day work period, reflecting the 8 hours in excess of forty worked during the 3 "48-hour weeks" that occur during the 28-day work period.

The Prince George's County Fire Department provides all of the emergency response services typically required by a modern metropolitan fire department. It responds, *inter alia*, to reports of fires, automobile accidents, bodily injuries and medical emergencies of all kinds, hazardous material spills, children and adults stuck in sewers or in trees or any other similar situation involving a need for rescue.

These services are provided by both volunteers and career (*i.e.*, paid) firefighters. All firefighters must be trained as Emergency Medical Technicians ("EMTs"). In addition, the Fire Department utilizes both volunteer and career paramedics, who have training in more advanced emergency techniques than the average EMT/Firefighter, as well as training in the fundamentals of fire suppression.

The career firefighters and paramedics are represented by the same union and are covered by the same collective bargaining contract. Until the District Court's judgment in *West v. Anne Arundel County*, the career firefighters and paramedics were assigned to work together as integrated

teams, assigned to one of the four shifts [3] and one of the several Fire Department facilities located throughout the County, and dispatched together to handle emergencies.

During the fiscal year ending June 30, 1996 (a representative period), calls for fire suppression services constituted a minor portion of the total emergency services calls handled by the Fire Department. During that period, there were approximately 103,000 Fire Department responses to calls for emergency medical services, divided relatively equally between medical emergencies and accidental (principally motor vehicle) injuries. Of these 103,000 responses, approximately 73,000 were responses by basic life support units (staffed by firefighters) and only 30,000 were responses by advanced emergency medical services units (staffed by paramedics). The firefighters and paramedics regularly responded to the same emergencies. *They operated as a team.*

As a result of Judge Black's decision, subsequently affirmed by the Court of Appeals for the Fourth Circuit, it became prudent for Prince George's County to employ its paramedics as if they were not covered by the §7(k) partial exemption. That meant scheduling the paramedics on the basis of the traditional 40-hour, 7-day work week, with an overtime premium due after 40 hours of work in a work week.

The County did not want to have to make this change. Aside from the direct financial costs, shift continuity was disrupted because paramedics would no longer be working

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[3] In a 28-day work period, each shift worked seven 24-hour tours of duty, thereby requiring four shifts for full coverage, 24-hours per day, 365-days per year.

the same schedule as the firefighter/EMTs. Likewise, team cohesion was undermined because the same crew would no longer be working together on a consistent basis.

Nor did the paramedics like the change. They, as well as their Union, considered the 24-hour tour of duty, seven times in 28 days, to be ideal scheduling. Indeed, when the County felt compelled to change to a 40-hours per week schedule in order to comply with Judge Black's decision in *West*, the paramedics responded by commencing a law suit against the County for having worked them on the basis of the 28-day work period schedule, on the theory that the schedule and pay system they actually preferred violated the Fair Labor Standards Act!

C. The Lower Courts' Interpretation of the §7(k) Exemption is Erroneous and Conflicts with the Decisions of Other Jurisdictions.

The Department of Labor's Regulations (29 C.F.R. §553.210(a)) expressly provide that §7(k)'s reference to "any employee...in fire protection activities" is not limited to fire suppression personnel, but "would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215."

In *Nally v. City of Baltimore*, 796 F. Supp. 194 (D. Md. 1992), Judge Black held that fire department paramedics must meet the four-part test set forth in 29 C.F.R. §553.210(a) for fire suppression personnel, ignoring the import of the "would also include" language of 29 C.F.R. §553.210(a).

Moreover, in *West*, Judge Black and the court of appeals held that even if the paramedics meet the four-part test set forth in 29 C.F.R. §553.210(a), the §7(k) partial exemption is not applicable unless the paramedics spend eighty percent or more of their time in fire suppression activities, pursuant to 29 C.F.R. § 553.212.

The requirement that paramedics meet the four-part test set forth in 29 C.F.R. §553.210(a) is directly contrary to the holdings of the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), the Sixth Circuit in *Justice v. Davidson County, Tennessee*, 4 F.3d 1387 (6th Cir. 1993), and the Seventh Circuit in *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994), *cert. denied*, 513 U.S. 1057 (1994). Those cases use the less stringent two-part test set forth in 29 C.F.R. §553.215 to determine whether paramedics are an "integral part of the public agency's fire protection activities," as required by 29 C.F.R. §553.210(a). That approach seems particularly appropriate in view of the fact that 29 C.F.R. §553.210(a) ends its reference to fire department "rescue and ambulance service personnel" by directing the reader to "See §553.215."

Moreover, the contrary approach used by Judge Black and the Fourth Circuit produces the inexplicable and incongruous result that the §7(k) partial exemption for "any [public agency] employee . . . in fire protection activities" is more readily available when public agency paramedics are <u>not</u> employed by a fire department and the less stringent §553.215 two-part test indisputably applies, then it is available when the paramedics are employed by a fire department.

In addition, the notion that paramedics employed by a fire department who are able to meet the four-part test of 29 C.F.R. §553.210(a) are not covered by the §7(k) exemption, as a result of 29 C.F.R. §553.212, if twenty percent or more of their time is spent on *medical* emergencies, essentially renders §7(k) a nullity insofar as any modern metropolitan fire department is concerned. As the court of appeals noted in *West*:

> [D]uring the period at issue in this lawsuit, at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all. Medical services which are not rendered at the scene of any fire do not qualify as exempt activities.

West, 137 F.3d at 761. If that statement of law were correct, not only would no fire department paramedics ever be eligible for the §7(k) exemption, but also the fire department suppression forces would also never be entitled to the §7(k) exemption *because essentially all metropolitan fire department operational employees spend more than twenty percent of their time in connection with "medical services which are not rendered at the scene of any fire."*

The petition for a writ of certiorari should be granted because, if the court of appeals decision in *West* is correct, the §7(k) partial exemption is no longer, as a practical matter, available to any fire department employee employed by fire departments located within the states comprising the Fourth Circuit, a result clearly not intended by Congress.

Finally, the petition for a writ of certiorari should be granted because if Anne Arundel County or Prince George's County or Baltimore City were located in Texas and the prevailing law was as stated by the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285, there would be no question that the §7(k) exemption would apply to these paramedic employees. That a public agency fire department in Texas has greater flexibility in scheduling its emergency medical services personnel than one located in Maryland is intolerable. It is especially intolerable to the Maryland jurisdictions since the 5th Circuit's decision (constitutional considerations aside) is correct.

II.

AS APPLIED IN THE PRESENT CASE, THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT VIOLATE CONSTITUTIONAL PRINCIPLES OF FEDERALISM

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X. In adopting the principles explicitly set forth in the Tenth Amendment, and implicitly provided by the structure of the Constitution itself,[4] the Framers of the

[4] The Framers' enumeration of specific powers expressly granted to Congress implies that there are powers, unenumerated, beyond Congress's reach. *Printz v. United States*, 112 S.Ct. 2365, 2376 (1997).

Constitution provided for a system of dual sovereignty to prevent concentration of power in one location as "an expedient solution to the crisis of the day." *Printz v. United States*, __*U.S.*__,117 S.Ct. 2365, 2383 (1997). The Framers also recognized that certain powers and responsibilities are better suited to local and State governance and sought to ensure that such powers would be free from Federal infringement. *The Federalist*, No. 45, at 313 (J. Madison)(J.Cooke ed. 1961).

Application of the Fair Labor Standards Act's provisions to fire departments, including their emergency medical personnel, constitutes a direct infringement upon the Constitutional guarantee of dual sovereignty. While the Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), ruled that applying the Fair Labor Standards Act to State and local governments does not violate the system of federalism established by the Constitution, recent cases have reaffirmed several of the principles underlying federalism and its limitations on Congress' power under the Commerce Clause, calling into question the validity of *Garcia*. *Printz*, 117 S.Ct. 2365 (1997)(Brady Handgun Violence Prevention Act's provisions requiring State officials to enforce Federal law violated Tenth Amendment); *New York v. United States*, 505 U.S. 144, 156 (1992)(Provision of Low-Level Radioactive Waste Policy Act mandating States to take title to radioactive waste under certain circumstances violated Tenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995)(Gun Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)(Article I of the Constitution did not empower

Congress to abrogate the States' Eleventh Amendment immunity.).[5]

Moreover, the very nature of the core State functions implicated by the present case -- provision of fire, rescue and emergency medical response services -- underscores the local nature of the interests concerned and the intrusiveness of Congress' infringement upon State sovereignty through the 1974 Amendments to the Fair Labor Standards Act.

In establishing a system of dual sovereignty, the Framers recognized that certain concerns are inherently local in nature and reserved to the States' sole power. *The Federalist* No. 45, at 313 (J. Madison)(J.Cooke ed. 1961)("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and the prosperity of the State.").[6] Provision of "fire prevention, police protection, sanitation, and public health" are "activities that epitomize the concerns of local, democratic self-government." *Garcia,* 469 U.S. at 575 (Powell, J., with whom Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined, dissenting) (discussing *National League of Cities v. Usery,* 426 U.S. 833, 851 (1976)).

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[5] In fact, while the Fourth Circuit recognized the recent cases reaffirming the principles of federalism, it ruled that it was bound by the *Garcia* decision until it is overruled by this Court. *West,* 137 F.3d at 760.

[6] While the Constitution provides Congress with substantial power under the Commerce Clause, Constitutional principles of federalism present a significant limitation upon that power. *New York v. U.S.,* 505 U.S. at 156-57.

The 1974 Amendments to the Fair Labor Standards Act apply the Fair Labor Standards Act requirements to State and local governments and direct the manner in which States and their political subdivisions may operate their fire, rescue and emergency medical services in several critical respects. In general terms, the 1974 Amendments require State and local governments to meet the minimum wage and overtime requirements applied to the private sector. *See* 29 U.S.C. §203(e)(2)(C). In specific terms, application of the FLSA to the emergency service employees at issue in this case affects the manner in which fire departments structure schedules, assign duties, structure and permit compensatory time off and pension benefits, determine pay and conduct labor relations. In addition, the actual funding of fire stations themselves may be affected by the constraints and burdens placed on local budgets by the FLSA.[7]

The differing demographics and characteristics of each State and each political subdivision of a State affects the needs and services required by each and thus makes the provision of such services a matter of inherent local concern.

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[7] The extent of Federal intrusion into the details of state and local government's core governmental functions, especially its public health and safety functions, is not limited to the §7(k) issue in *West*. For example, Prince George's County, Baltimore City, and St. Mary's County have each been defendants in Federal court in cases involving whether, how and to what extent public safety officers who are assisted by dogs while on duty must be compensated for their incidental off-duty care, feeding, grooming, exercising, etc. of their canines. Indeed, the federal court "canine" cases are legion. *See, e.g., Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274 (E.D. Va. 1992). To the extent that *Garcia's* reversal of *National League of Cities* was predicated on the judicial burden of deciding what are core functions of local government, *see Garcia*, 469 U.S. at 538-47, it has had the paradoxical effect of making federal cases out of a plethora of routine local government personnel practices.

For example, the *amici curiae* that are parties to the present brief, are all located in the State of Maryland and yet they present very different requirements with regard to fire, rescue and emergency medical services.

Baltimore City and Prince George's County are both part of major metropolitan areas and must address the myriad of public safety concerns characteristic of such areas.

In contrast, St. Mary's and Worcester Counties are predominantly rural areas with growing populations. The needs of these counties are substantively and quantitatively different from those of Prince George's County and Baltimore City. Both rural counties respond to fewer calls in general; however, they have a much smaller tax base to fund the provided services.

These four localities, which represent but a small sampling of political subdivisions nationwide, present diverse needs in terms of fire suppression, rescue and emergency medical services. This is precisely the reason that these services are inherently matters of local concern, reserved to the State governments by the Tenth Amendment. While the Constitution confers upon Congress broad powers in the Commerce Clause, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. U.S.*, 505 U.S. at 157. Matters which are the very essence of State and local concern, such as the fire protection, rescue and emergency medical services at issue in this case, are protected from federal infringement by the principles of dual sovereignty both explicitly and implicitly provided by the Constitution.

Accordingly, the Court should grant Petitioner Anne Arundel County, Maryland's petition for writ of certiorari to preserve the integrity of the States' sovereign interests and to nullify the 1974 Amendments to the FLSA as applied below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: November 3, 1998

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, et al.,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IOWA, MARYLAND, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING, IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether application of the Fair Labor Standards Act Amendments of 1974 to government firefighters who perform emergency medical services violates the Tenth Amendment and the Constitution's structural framework of dual sovereignty by: (i) directing the functioning of state and local public safety operations; and (ii) interfering with the provision of essential governmental emergency services.

2. Whether this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), should be overruled.

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AMICI CURIAE BRIEF

The States of California, Alabama, Arizona, Colorado, Delaware, Hawaii, Iowa, Maryland, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Utah, Washington and Wyoming, respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for certiorari filed in this case by Anne Arundel County, Maryland.

INTEREST OF *AMICI CURIAE*

California and its sister States represent sovereign entities in our federal system. Each of the *amici* States has enacted its own set of regulatory programs, under its police power authority, to protect the health, safety and welfare of its citizens. Except to the very limited extent they are preempted by the federal government under the Supremacy Clause of the U.S. Constitution, these state regulatory efforts constitute distinct governmental programs, enacted and administered by the sovereign States.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.

This Court has repeatedly recognized that the Tenth Amendment is but one manifestation of the Constitution's overriding concern with fostering and protecting our system of dual sovereignty. Moreover, the text of the

Constitution provides the beginning rather than the end of every inquiry into questions of federalism, for "behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); see also, *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365, 2376 (1997).

The present case presents a clear and present danger to these principles of cooperative federalism. By declaring the most essential of governmental functions to be subject to the congressional mandates of the Fair Labor Standards Act, 29 U.S.C. § 202 ff. (FLSA), the courts below have allowed the serious disruption of efforts by state and local governments to serve the public health, safety and welfare. The decision below, finding that county firefighters who perform emergency medical services are subject to the full federal mandates of the FLSA, has several unfortunate impacts. It strains local government fiscal resources at a time when finite revenues are needed to address an ever-increasing array of public needs. It disrupts the day-to-day operation of core government services upon which the public is vitally dependent. And finally, it serves as a formidable disincentive to state and local government innovation, experimentation and reform.

This litigation is not an aberration. To the contrary, state and local governments throughout the United States have faced similar attacks on their sovereignty in the 13 years since *Garcia* was decided. The Court need look no further than the FLSA itself to gage the untoward impacts on state and local governments.

A few examples are illustrative. In California, the FLSA's mandated application to state salary and personnel programs has had a distorting effect on the organization and staffing of state government. Due to the overtime provisions of the FLSA, California finds itself in the anomalous situation of having to pay some rank-and-file employees more than the supervisors who oversee them. The deleterious effect on efforts to recruit and retain effective managers in government service is obvious.

FLSA's application to the States can have enormously disruptive effects on the state budgetary process and the public fisc as well. In California, the inability of state political leaders several years ago to enact a state budget on a timely basis resulted in a short delay in payment of salaries to state employees. That delay, in turn, resulted in federal courts' finding that the State of California had violated the FLSA. See, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994); see also, *Caldman v. State of California*, 852 F.Supp. 898 (E.D. Cal. 1994) (imposing liquidated damages against the State under the FLSA). In an effort to comply with this judicially-declared FLSA mandate, state officials have in more recent years paid salaries to state employees before a state budget was enacted, despite the fact that the California Constitution specifically proscribes any such payments in the absence of a validly-enacted state budget. Cal. Const., Art. IV, § 12(c). Earlier this year, California taxpayers invoked that state constitutional provision to sue California officials in state court, seeking to bar the immediate payment of state employee salaries as mandated under the FLSA. *Howard Jarvis Taxpayers Assn. v.*

Connell, Los Angeles County Superior Court No. BC193174.

Nor are the deleterious impacts of the FLSA limited to California. In Iowa, for example, 117 supervisory law enforcement officers employed by that State's Department of Public Safety, up to and including the chief executive officer with the Iowa State Patrol, have sued to recover overtime wages pursuant to the FLSA. They predicated their claim on the theory that they are not paid on a "salary basis" due to implementation of the Department's disciplinary policy, despite the fact they perform management functions. Accordingly, they argue that the FLSA "section 7(k)" exemption is inapplicable to them under implementing federal regulations. This litigation has, in turn, required Iowa officials to modify substantially the disciplinary procedures for law enforcement officers to avoid substantial overtime liability. See *Raper v. State of Iowa*, Polk County District Court No. CL 6891841.

The present case provides the Court with the opportunity to revisit the FLSA's applicability to state and local governments under applicable principles of federalism. In the view of the *amici* States, the application of the FLSA to the public safety employees at issue herein represents "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *City of Boerne v. Flores*, 521 U.S. ___, 117 S.Ct. 2157, 2171 (1997).

A decision that Congress has the broad authority under the Commerce Clause to disrupt core state health and safety programs under the FLSA and similar federal

legislation has the potential of vast and far-reaching consequences for all States. *Amici* States are therefore vitally interested in the resolution of this case.

REASONS FOR GRANTING THE WRIT

Petitioner Anne Arundel County has identified several compelling reasons warranting the Court's review in this case. A threshold issue is how the section 7(k) exemption contained in the FLSA should be interpreted. As petitioner County notes, this question has divided the lower courts and produced conflicting and inconsistent results. Petition at 14-17. That fact alone warrants exercise of the Court's discretionary review. Supreme Court Rule 10(a).

Of even greater concern to *amici* States, however, is the fact that the decision below contravenes basic principles of federalism upon which this nation is founded. Those principles have been recognized and articulated in a series of recent decisions by this Court. The Fourth Circuit's opinion, by fundamentally misconstruing the Constitution and the Court's federalism precedents, threatens tenets of state sovereignty that this Court has repeatedly deemed crucial and inviolate in our federal system. The resulting conflict between the decision below and applicable constitutional principles governing the state-federal relationship provide an additional, and even more compelling, reason why the petition should be granted. Supreme Court Rule 10(c).

Amici States offer two arguments in support of the constitutional arguments advanced in the County's petition. First, the decision below is fundamentally inconsistent with the Constitution, as underscored by this Court's recent federalism decisions. In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), a majority of the Court held that the FLSA generally applies to state and local governments. However, *Garcia* acknowledged that "the States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Garcia*, 469 U.S. at 549, quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting). *Garcia*, moreover, dealt with the status of municipal transit workers under the FLSA. By contrast, at issue in this case is the operation of emergency medical services – a function that is at the very heart of government's responsibility to protect public health and safety. Whatever the proper boundaries of *Garcia*, that decision should not be construed to require the FLSA be made applicable to county firefighters who provide emergency medical services to the public.

Second, *amici* States respectfully urge that *Garcia v. San Antonio Metro. Transit Auth.* be overruled. To the extent that *Garcia* can be interpreted to hold that the Constitution imposes no federalism-based limits on the application of the FLSA to the States, that decision is inconsistent with both the Constitution and a series of more recent federalism cases decided by the Court. Those latter decisions repeatedly confirm that the U.S. Constitution envisions a system of dual sovereigns, and that Congress may not under its Commerce Clause authority enact legislation that binds the States in disregard of the States' sovereign powers. *Amici* States submit that the time has

come to conform *Garcia* to this Court's federalism jurisprudence developed over the past decade.

A. The FLSA Amendments of 1974 are Unconstitutional as Applied to the Firefighters Performing Emergency Medical Services in this Case. *Garcia* Does Not Compel – and Should Not Be Extended to Justify – a Contrary Conclusion.

In 1974 amendments to the FLSA, Congress made the overtime and minimum wage requirements of the FLSA generally applicable to employees of state and local governments. Pub. L. No. 93-259, codified at 29 U.S.C. section 203(e)(2)(C). To apply the FLSA to the employees at issue here – firefighters specially trained and assigned to provided emergency medical services to the public – contravenes the Tenth Amendment and related principles of federalism.[1]

This case involves government officials – and government programs – addressing the most fundamental of government's responsibilities to protect public health and safety. As petitioner County has noted, the majority of

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[1] Constitutional principles of federalism and State sovereignty are properly invoked by either the States or their political subdivisions. *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365, 2382, n.15 (1997); *National League of Cities v. Usery*, 426 U.S. 833, 855-856 (1976), *overruled on other grounds* in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The exception to this rule is the States' Eleventh Amendment immunity from unconsented suit in federal court; that immunity may only be asserted by the States themselves, and not by the States' political subdivisions. *Monell v. New York City*, 436 U.S. 658, 690, n.54 (1978).

fire department responses in Anne Arundel County relate to the provision of emergency medical services. Petition at 11-12. The County's experience reflects that of local fire departments throughout the United States. *Ibid.*

To force petitioner County to apply the FLSA to these public safety employees would be particularly disruptive of county programs and invasive of the public fisc. It would permit Congress to "exercise power in a fashion that impairs the States' integrity [and] their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975).

Garcia v. San Antonio Metro. Transit Auth., supra, does not compel such a result. *Garcia* held that the FLSA could be applied to municipal transit workers, consistent with the Tenth Amendment. However, the Court's decision in *Garcia* stressed that this holding did "not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." 469 U.S. 528, 556. Moreover, the majority in *Garcia* was careful to note "the special concerns of States and localities with respect to" firefighting and law enforcement personnel. *Id.* at 554, n.17. In his dissent in *Garcia*, Justice Powell took pains to characterize fire prevention, police protection and public health as "epitomiz[ing] the concerns of local, democratic self-government." *Id.* at 575 (Powell, J., dissenting).

The application of the FLSA in this case would have enormously disruptive consequences on the most essential public services performed by States and local governments. The decision of the lower court, if affirmed,

abrogates the States' sovereign ability to protect the health and safety of their citizens. Similarly, it disallows the governmental framework by which States and their political subdivisions fund and provide those services.

Even without abandoning *Garcia*, the Court can insure that States' legitimate sovereign interests are preserved by applying the constitutional principles announced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 521 U.S. ___, 117 S.Ct. 2365 (1997); *City of Boerne v. Flores*, 521 U.S. ___, 117 S.Ct. 2157 (1997); *Arizonans for Official English v. Arizona*, 520 U.S. ___, 117 S.Ct. 1055 (1997); and related cases. The Court should do so by declining to follow the example of the lower courts in expanding *Garcia* beyond its factual or constitutional moorings. It contravenes important public policy considerations to make the FLSA applicable to county workers who provide emergency medical care to members of the public. More to the point, expanding *Garcia* to reach that result contravenes vital constitutional principles that this Court has reaffirmed over the last decade. Limiting *Garcia's* scope, and finding the FLSA inapplicable to the public officials at issue here, in turn places *Garcia* in a more proper constitutional context, and ensures that the application of the FLSA to the States is consistent with the constitutional principles this Court has enunciated in its federalism decisions subsequent to *Garcia*.

B. *Garcia v. San Antonio Metropolitan Transit Authority* Should Be Overruled.

1. *Garcia* Is Fundamentally Inconsistent With Federalism Principles Inherent in the Constitution, as Recognized in the More Recent Jurisprudence of This Court.

In its recent jurisprudence the Court has reaffirmed that, along with individual liberties and the separation of powers doctrine, federalism represents a key, inviolate theme of American constitutional law. In a series of recent decisions beginning with *Gregory v. Ashcroft*, this Court has reaffirmed that federalism is not an outdated or flaccid constitutional theory. It is, rather, one of the touchstones of the American system of government. See, e.g., *New York v. United States, supra; United States v. Lopez, supra; Seminole Tribe v. Florida, supra; City of Boerne v. Flores, supra.* "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz, supra,* 117 S.Ct. at 2381.

The Court's 1985 decision in *Garcia, supra,* is fundamentally inconsistent with the Constitution, as interpreted in the Court's more recent federalism precedents. The present case acutely demonstrate's *Garcia's* inconsistency with the most basic principles of State autonomy. The lower court itself noted "the strong commitment to state sovereignty evidenced in this series of [post-*Garcia* federalism] cases" (137 F.3d 752, 758), but ultimately concluded it was bound by *Garcia* to rule in favor of respondents. *Id.* at 760 ("Any decision to revisit *Garcia* is not ours to make.")

In the wake of *New York, Lopez, Printz,* et al., it is apparent that given the "constitutional postulates" of federalism, application of the FLSA to the States "compromise[s] the structural framework of dual sovereignty." *Printz, supra,* 117 S.Ct. at 2383. Accordingly, *amici* States respectfully urge the Court to take this opportunity to overrule *Garcia* as inconsistent with its more recent jurisprudence and the most basic principles of federalism.

2. The Continuing Impacts of *Garcia* on State Sovereignty Are Both Deleterious and Severe, as the Present Case Demonstrates.

How California, its sister States, and local entities throughout the nation organize and prioritize the delivery of governmental services represent the most fundamental judgments by which States and their political subdivisions define themselves. It is these activities that "go to the heart of representative government." *Gregory v. Ashcroft, supra,* 501 U.S. 452, 461, citing *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). The provision of governmental services to protect public health, safety and welfare – and the ability to collect and appropriate the requisite funds to do so – is one of the principal, legitimate interests of States envisioned under federalism principles. *Duncan v. McCall,* 139 U.S. 449 (1891).

The fundamental error of the lower court in this case is in ignoring the teachings of this Court's ample federalism jurisprudence over the past decade. The court of appeals instead construed *Garcia* to hold that the FLSA applies "carte blanche" to the States – regardless of the

governmental programs or employees involved. Unhappily, that construction of the FLSA vis-a-vis the States has been routinely enforced by lower federal courts nationwide. See, e.g., *Biggs v. Wilson, supra,* 1 F.3d 1537.

In practice, *Garcia* has opened the door to an almost unlimited application of federal regulation of the States under the Commerce Clause – no matter what the ultimate effect on a State's sovereignty – to the exclusion of the federalism principles reaffirmed in such cases as *Gregory, New York, Printz, City of Boerne* and *Seminole Tribe.* The effect, in situations where the FLSA and similar statutes are applied to the States acting in their sovereign capacities, is to upset the careful constitutional balance of federal and state powers.

Another unhappy and unintended consequence of *Garcia* is to deprive the States, in many contexts, of acting as the "laboratories of social and economic experiment" that Justice Brandeis urged them to be nearly 70 years ago. *Garcia,* 469 U.S. at 546, quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If States are to be treated as the functional equivalent of private businesses for purposes of the FLSA, the States' ability to deliver essential government services in an innovative and cost-effective manner will continue to be compromised.

Additionally, *Garcia* admonished that States should look principally to the federal political process for protection of their interests under the Constitution. *Id.* at 552-554. With all due respect, substantial federal legislation enacted since that time under the Commerce Clause demonstrates that the political process provides precious

little protection to state sovereignty. See, e.g., *New York* (Low-Level Radioactive Wastes Policy Amendments Act); *City of Boerne* (Religious Freedom Restoration Act); and *Printz* (Brady Handgun Control Act). More to the point, the Court's recent federalism jurisprudence reaffirms the principle that the guarantees of State sovereignty woven into the fabric of the Constitution can and should be enforced by a watchful judiciary. *Ibid.*; see also, *Lopez, supra*. *Garcia's* dismissal of judicial remedies in favor of the political process abandons federalism principles. It is at variance with the Constitution, as reflected in the Court's overall jurisprudence on the subject.[2] *Amici* submit that the Court should expressly recognize that fact and abandon *Garcia*.

3. *Garcia* Should Be Replaced With a Constitutional Standard That Immunizes Core State Programs From Generally-Applicable Federal Legislation Enacted Under the Commerce Clause. This Court and Constitutional Scholars Have Articulated Several Alternate Tests That Would Serve That Purpose.

In overruling its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), a bare majority of the Court in *Garcia* concluded that the "traditional governmental functions" test it characterized as being articulated

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[2] "The States' role in our system of government is a matter of constitutional law, not of legislative grace." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting).

in *Usery* had subsequently proven both amorphous and unworkable. 469 U.S. at 538.[3]

Four dissenting justices took issue with that conclusion. Justice Powell characterized *Usery* as establishing a workable, multifactored balancing test, consonant with many constitutional standards utilized by the Court in other contexts. 469 U.S. at 562-563.[4] Justice O'Connor, also in dissent, suggested a modified balancing test which weighs the need for State autonomy against federal interests. *Id.* at 588-589 (O'Connor, J., dissenting). Then-Associate Justice Rehnquist noted these various formulations, suggested that each appeared plausible, and presciently noted:

> I do not think it incumbent on those of us in dissent to spell out the fine points of a principle

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[3] The Court in *Usery* had actually utilized *several* discrete concepts in identifying those State programs which it found the Tenth Amendment and related constitutional principles to insulate from federal control under the Commerce Clause. See, e.g., 426 U.S. at 850 (describing "essential governmental services"); *id.* at 851 (identifying federal statutes that "impermissibly interfere with the integral governmental functions" of States); *id.* at 852 ("displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions"). The Court's decision in *Usery* is also noteworthy in that it repeatedly refers to firefighters and public health officials as embodying this very type of excluded state program.

[4] The *Garcia* majority itself began its analysis by characterizing *Usery* as involving a four-part constitutional test. *Id.* at 537. That *Usery* has subsequently come to be associated with the "traditional governmental functions" standard thus seems both ironic and overly-simplistic.

> that will, I am confident, in time again command the support of a majority of the Court.

Id. at 580 (Rehnquist, J., dissenting).

The key point is that the *Usery* standard was neither as simplistic as its legacy suggests, nor as unworkable as *Garcia* or respondents herein would indicate.

This Court, however, need not resurrect the precise legal standard(s) identified in *Usery* in order to move beyond *Garcia* and bring its FLSA jurisprudence into conformance with the proper dictates of federalism. Indeed, the Court's more recent federalism precedents articulate related constitutional standards that could prove quite helpful in determining which congressional statutes can be applied to States, consistent with the demands of our federal system. *Gregory v. Ashcroft*, for example, focused on "areas of traditional state authority." 501 U.S. 452, 469; accord: *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 288 (1981). In *Printz*, the Court recently suggested an appropriate benchmark would be "whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments." 117 S.Ct. 2365, 2383.

As might be expected, constitutional scholars have not been reticent about suggesting their own constitutional standards for determining when Congress' Commerce Clause authority may be made binding upon the States under the Tenth Amendment and related federalism principles. See, e.g., Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 105 (1985) (proposing a "core governmental functions" test that

would restrict State immunity to "essentially internal state activities"); Douglas A. Axel, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 Hastings L. J. 641, 655 (1994) (proposed test would focus in part on those government functions "unsuitable to leave to the private sector"); Igor Kirman, *Standing Apart to Be a Part: The Precedental Value of Supreme Court Concurring Opinions*, 95 Columbia L. Rev. 2083, 2092 (1995); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 Duke L. J. 1, 11-12 (1986) ("The correct response would have been for the Court to deal with these issues case by case, balancing the interests in state sovereignty against the interests in uniform national policy under the commerce clause"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harvard L. Rev. 2180, 2207-2208 (1998). (federalism "may require some inquiry . . . regarding the degree to which application of a [federal] statute interferes with core, or important, state governmental functions.").

As the court of appeals below itself noted, even aside from *Usery*, this Court has previously utilized ad hoc tests in order to strike an appropriate balance between the needs of a national government and the rights of the sovereign States. 137 F.3d 752, 758-759, citing *Fry v. United States*, 421 U.S. 542 (1975); *South Carolina v. Baker*, 485 U.S. 505 (1988).

In sum, should the Court perceive it appropriate to do so, it can articulate a constitutional standard in this area distinct from that announced two decades ago in *Usery*. What *amici* States respectfully request is that the Court not abandon the field of state sovereignty entirely when it comes to federal legislation exemplified by the

FLSA, as occurred in *Garcia*. *Cf. Garcia*, 469 U.S. 528, 580 (O'Connor, J., dissenting) ("The Court today surveys the battle scene of federalism and sounds a retreat"). The instant case provides this Court with a timely and propitious opportunity to re-examine the vital constitutional principles which are presented by the County's petition for certiorari.[5]

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[5] The fact that these issues and their resolution are complex does not make them less appropriate for this Court's review:

> "It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National League of Cities*. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance." *Garcia, supra*, 469 U.S. at 588-589 (O'Connor, J., dissenting).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: November 1998.

Respectfully submitted,

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No. 98-266

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND
Petitioner,

v.

JOHN D. WEST, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services, where Congress intended to exempt them, and the plain statement rule dictates exemption if the law is ambiguous?

2. Whether the Fair Labor Standards Amendments of 1974 violate the Tenth Amendment?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Anne Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.;

Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.; Dawn Rodriguez; David R. Klinger; William H. Phillips; Bruce E. Fritz; Charles Edward Yetter; R. Thomas Crow II; Debbie Schueler; William A. Cooper, Jr.; Steven K. Frye; Michael C. Huffman; Joseph M. Jordan; David James Geslois; Russell E. Davies, Jr.; Erick A. Esker; Donald Weigel; Ralph David Ritchie; Kenneth S. Banke; Jeannie Squillaci; Harry Joseph Joyave; Michael B. Ladd; William L. Bethea III; John E. Lamb; Daniel T. Woolston; Patrick J. Carmody; Clarence Gerard Hayes; Brett J. Howe; D. Depriest; John G. Alexander; Steven P. Ambrozowicz; Daniel F. Bowen; Claudia L. Clark; Susan E. Egan; Stephen Scott Feilinger; James Edward Harsh; Sarah Lefler; John Duffy McAnallen; Robert O'Brien; Michael F.X. O'Connell, Jr.; Anthony J. Pugliese; Edward Joseph Ross III; Randall W. Corbel; Kenneth T. Claypool; John A. Covington; John N. Dennett; George F. Dickey; Stephanie Sheinbach Dietz; Roland Fink, Jr.; Walter A. Ford, Jr.; Jeffrey L. Orye; Kenneth L. Pardoe; Keith A. Lefler; James L. Kidwell; Thomas A. Pezza; David A. Badwak; Douglas Bosley; Thomas R. Butler, Jr.; and Michael P. Henry. The United States of America is an Intervenor. Baltimore County, Maryland, is an *amicus curiae*.

CORPORATE DISCLOSURE

Baltimore County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Baltimore County, Maryland, and as such has no corporate parents or subsidiaries.

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Baltimore County, Maryland, respectfully supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab.Cas. P33, 647,4 Wage and Hour Cas.2d (BNA) 641 (Feb. 18, 1988) (No. 96-1280, 96-1251). The opinions of the district court are unreported. All of these opinions appear in the appendix to the petition filed by Anne Arundel County.

JURISDICTION

The court of appeals has entered its judgment, which this Court may review by issuing a writ of certiorari to exercise jurisdiction of this case under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *amici curiae* adopt the provisions set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Baltimore County is a political subdivision of the State of Maryland and exercises the powers of local government and home rule provided by the Maryland Constitution. Md. Const. art. XI-A; Md. Ann. Code, Art. 25A (1998). The County provides fire and rescue services to its community.

Modern fire departments, such as the Baltimore County Fire Department, are required to respond to various types of emergencies. The responsibilities of the County Fire Department are not limited to mere fire suppression. Article III of the Baltimore County Fire Department's Rules and Regulations Handbook vests the general administration and control of the Fire Department in a Fire Chief. The Fire Chief is responsible not only for the general conduct of the Fire Department, but also for the protection of life and property, fire prevention, fire investigations, public education, fire prevention code enforcement, and the provision of emergency medical care to County residents. The wide scope of "fire protection services" provided by the County Fire Department evidences the County's response to expanding community needs. The above listed responsibilities of the Fire Department are integral aspects of local fire and rescue services. The plain meaning of the FLSA recognizes rescue services as an indispensable aspect of "fire protection services."

REASONS FOR GRANTING THE PETITION

This Court should hear this case to clarify the ability of a local government to incorporate emergency medical services into its fire protection services. The ambiguity of the term "fire protection services" must be deciphered. The Department of Labor Regulations and lower courts have been unable to elucidate the issue, which has resulted in a nationwide confusion. It is now time for this Court to interpret the phrase, and

reconsider the applicability of the FLSA to local governments.

I.

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND HEIGHTENS THE CONFUSION SURROUNDING THE § 7(k) EXEMPTION.

The lower court decisions addressing the applicability of the 29 U.S.C. § 207(k) exemption deviate in the rationale utilized to reach the end result. Hence, the decisions involving an identical issue, the applicability of 29 U.S.C. § 207(k) to emergency medical technicians[1], conflict throughout the country. The courts have attempted to interpret and clarify the Fair Labor Standards Act using both the Code of Federal Regulations ("C.F.R."), promulgated by the Department of Labor ("DOL"), and the Department of Labor letters in efforts to realize and properly apply Congressional intent. Yet a uniform, nationwide application has not been attained.

Several tests have been advanced in determining the §207(k) exemption requirements. Pursuant to 29 C.F.R. § 553.210(a)[2], the DOL offers a four part test to define the term

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[1]The term "emergency medical technicians" (EMT) also includes paramedics.

[2] 29 C.F.R § 553.210(a) establishes a four-part test defining "any employee...in fire protection activities" as follows: any employee (1)

"any employee in fire protection activities." Following the four part test, the section continues:

> the term would also include rescue and ambulance service personnel if such personnel form an *integral part* of the public agency's fire protection activities. See § 553.215.

(Emphasis added). The regulations specifically steer the reader to 29 C.F.R. § 553.215 for guidance. While the intent of Congress to include rescue and ambulance personnel within the exemption is clear, the "integral part" test is ambiguous.

Reference to 29 C.F.R. §553.215 is of little help. Section 553.215 further confuses the issue by its first sentence.

> Ambulance and rescue service employees of a public agency *other than* a fire protection or law enforcement agency may be treated as employees engaged in fire protection...[3]

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who is employed by an organized fire department or fire protection district;(2) who has been trained to the extent required by State statute or local ordinance;(3) who has the legal authority and responsibility to engage in the prevention, control, or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, ...

[3] Ambulance and rescue service employees may be treated as employees engaged in fire protection if their services are substantially related to firefighting. The two-part "substantially related" test of 29 C.F.R. § 553.215 requires that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims

(Emphasis added). Reading 29 C.F.R. § 553.210 together with 29 C.F.R. § 553.215, it appears that, by its terms, the "substantially related" test advanced in 29 C.F.R. § 553.215 does not apply to employees employed by an organized fire protection public agency, the first element of the 29 C.F.R. § 553.210 test. Therefore, a literal reading indicates that the substantially related test may not be used to determine if an employee satisfies the integral part requirement. The reference to § 553.215 in § 553.210 is inconsistent with the apparent coverage of 29 C.F.R. § 553.215.[4]

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or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters, and accidents.

[4] The Seventh Circuit, in Alex v. City of Chicago, 29 F.3d 1235, 1241 n.5 (7th Cir. 1994), addressed this conundrum and stated: "The plain language of § 553.215, or more precisely a negative inference drawn from the plain language- referring to employees of "other" agencies- does not resolve matters here...because the language of § 553.210, the appropriate starting point of our analysis, almost as plainly counters that interest." The court further explained the cross reference in § 553.210 to § 553.215 as follows:

> The Labor Department has confirmed what the cross reference 'See § 553.215 strongly implies: that the substantial relatedness of a fire department's ambulance personnel to the agency's fire protection activities, as explicated in § 553.215, tests such personnel's eligibility for the § 7(k) exemption just as it tests allpublicly employed ambulance personnel's eligibility for the exemption.

Various circuits have utilized different combinations of these regulations when deciding cases on this issue. The Fifth, Sixth, Seventh, and Eighth Circuits exempted emergency medical technicians from 29 U.S.C. § 207(a), and instead determined they were employed in "fire protection activities" under 29 U.S.C. § 207(k). The Fifth Circuit, in Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991), reached its conclusion using 29 C.F.R. §§ 553.210, 553.215, and a Department of Labor Wage and Hour Division Administrative Letter Ruling dated October 9, 1987. The emergency medical services employees at issue received training for rescue for purposes of § 553.215 since they had knowledge of basic lifesaving procedures (CPR, administering oxygen, and extrication techniques). Pursuant to the DOL Letter Ruling, the court determined that it was not necessary that the employees routinely perform the lifesaving procedures. Additionally, the "regularly dispatched" requirement was met. The Fifth Circuit solved the inherent complexity between § 553.210 and § 553.215 by ignoring the first sentence of § 553.215.

The Sixth Circuit, by applying §553.210 in conjunction with the substantially related test set forth in § 553.215, held that rescue and ambulance service employees of a public

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§ 553.210 describes in general terms what § 553.215 expounds in more detail.

Alex, 29 F.3d at 1242.

agency's fire protection activities satisfied the "integral part" requirement. If the employees satisfied the substantially related test set forth in § 553.215, the 80/20 exemption requirement established in §553.212, and met the majority of work requirement, they were covered by 29 U.S.C. § 207(k). Justice v. Metropolitan Government of Nashville, Davidson County, 4 F.3d 1387 (6th Cir. 1993).*See also* Alex v. City of Chicago, 29 F.3d 1235 (7th Cir. 1994) (The court applied the § 553.215(a) substantially related test, but determined that paramedic employees of the city fire fighting department were not covered by the exemption since they did not receive training to perform rescue activities beyond those of a medical nature).

The Fourth Circuit's decision in West is directly at odds with the approach taken by the Eighth Circuit. The Eighth Circuit applied 29 C.F.R. § 553.212 in the recent case of Christian v. City of Gladstone, 108 F.3d 929 (8th Cir. 1997) after determining that paramedics who were also sworn firefighters were employees in fire protection activities under the four part test of §553.210. In considering the meaning of nonexempt work in § 553.212, the Eighth Circuit utilized the approach established by the Fourth Circuit in Schmidt v. County of Prince William, 929 F.2d 986 (4th Cir. 1991). The Fourth Circuit approach requires two factors. First, is the work in question distinct from and unrelated to fire protection activities, and second, whether the essential nature of the firefighter's job changes and he is required to perform tasks unrelated to his job. The Eighth Circuit held that time spent on paramedic activities

not stemming from a fire or car accidents is exempt, since responding to such calls does not alter the nature of the paramedics' duties or cause them to perform tasks unrelated to their job.

However, other courts, faced with similar situations, decided emergency medical technicians were not engaged in fire protection and were subject to 29 U.S.C. § 207 (a), not § 207(k). *See* Spires v. Ben Hill County 980 F.2d 683 (11th Cir. 1993) (emergency medical technicians did not satisfy the regularly dispatched requirement, the second element of the § 553.215 test); Nalley v. Mayor of Baltimore, 796 F.Supp. 194 (D.Md. 1992) (applied §553.210 four part test and determined employees were not an integral part of the fire protection activities; only 1% of their time was spent on fire related activities, so § 553.212 80/20 test not satisfied, and § 553.215 inapplicable by its terms.); Burgess v. Catawba, 805 F.Supp. 341 (W.D.N.C. 1992) (Although § 553.215 requirements met, more than 70% of calls were medical and not fire related, therefore § 553.212 80/20 test not met.); Horan v. King County Division of Emergency Medical Services, 740 F.Supp. 1471 (W.D.Wash. 1990) (not trained to rescue nor regularly dispatched within § 553.215 meaning).

It is uncontroverted among the circuits which considered the issue that ambulance and rescue service personnel can be included within the term "employee in fire protection activities." However, due to the various readings of the Department of Labor Regulations, the circuits are deeply misguided over what

test or tests are to be used and when they should be used. The Court should grant certiorari to clarify the misconceptions and provide a uniform interpretation.

II.

CONGRESS INTENDED THE § 7(k) EXEMPTION TO PERTAIN TO LOCAL GOVERNMENT EMPLOYEES ENGAGED IN AMBULANCE AND RESCUE SERVICES.

Investigation into the legislative history surrounding the FLSA and the 1974 Amendments reveals the Congressional intent to exclude public ambulance and rescue employees from the general forty hour overtime standard. Congress intended to include public ambulance and rescue employees within the § 207(k) exemption.

Recognizing the special needs of governments in adequately providing for the public safety, Congress established a limited overtime provision for "police officers, firefighters, and *related employees*." (Emphasis added). 52 Fed.Reg. 2012, 2015.[5] Due to the unusually long hours public safety employees are required to spend on duty, ready and available to respond to calls to protect the public safety, Congress appreciated the fiscal hardship State and local governments would suffer if required

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[5]The applicable overtime provision provides that firefighters are to be compensated for overtime after working 212 hours in 28 consecutive days.

to compensate public safety employees on the same basis as other governmental employees. Therefore, the 1974 Amendments, while extending the minimum wage and overtime coverage of the FLSA to all government employees, maintained the overtime exemption for policemen and firemen. The rationale behind exempting policemen and firemen pertains equally to ambulance and rescue service employees. EMTs are subject to the same unusually long hours to protect the public safety. Therefore, it is nonsensical to apply the § 207(k) exemption to policemen and firemen but not to ambulance and rescue service personnel subject to the same unusually long hours for identical reasons.

Representative Quie, the ranking member of the General Labor Subcommittee during passage of the 1974 Amendments, when queried about Congress' intent to cover employees engaged in rescue-ambulance services by the phrase "public agency employees who are engaged in fire protection... 'activities'", replied:

> ...that provision...is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities...

120 Cong.Rec. 8598 (1974). The legislative history referring to Congress' intent with respect to ambulance and rescue service personnel is scarce. However, the above colloquy clearly

indicates § 207 (k) was designed to include emergency medical technicians.

III.

THE PLAIN STATEMENT RULE EMPLOYED IN GREGORY APPLIES TO TRADITIONAL AND ESSENTIAL STATE FUNCTIONS, INCLUDING THE OPERATION OF LOCAL FIRE DEPARTMENTS.

Finally, the ambiguity of the exemption at issue raises questions of statutory construction. The application of the "plain statement" rule presented in Gregory v. Ashcroft, 501 U.S. 452 (1991) requires the Court to include emergency medical technicians within the §207 (k) overtime exemption. Faced with the applicability of the ADEA to state judges, the dispute revolved around whether state judges were encompassed by the exemption referring to "policymaking level appointees." Due to the ambiguity of the phrasing, the court applied the plain statement rule. Since the ADEA did not *plainly cover* appointed state judges, this Court held state judges were not covered by the ADEA.[6]

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[6]The Court stated: " Nonetheless, 'appointee at the policymaking level', particularly in the context of the other exemptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing...We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included." 111 S.Ct at 2404.

Recognition of the delicate balance between permissible federal power under the Commerce Clause and impermissible intrusions on State sovereignty compels use of the plain statement rule in the instant case. When a federal law imposes a major intrusion on state authority, the Court must be absolutely certain such an outcome was intended for the law to be upheld as applied to the States. Protection of the important constitutional concept of federalism, on which our government is predicated, requires the federal government to explicitly state its intent to overturn local autonomy. The plain statement approach is an important tool for protecting state authority. Congress must address federalism concerns explicitly.

Analogous to the application of the ADEA to state judges, the FLSA does not *plainly cover* ambulance and rescue service personnel. Therefore, since Congress did not plainly state that ambulance and rescue service personnel were to be covered by the forty hour overtime provisions of the FLSA, the logical conclusion applying the Gregory plain statement rule is that they are not covered by the FLSA.

IV.

THE FLSA, AS APPLIED TO THE STATES PURSUANT TO GARCIA, IS VIOLATIVE OF THE TENTH AMENDMENT.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), this Court held that the overtime and

minimum wage provisions of the Fair Labor Standards Act, as applied to a public mass transit authority, are not violative of any constitutional provision or destructive of state sovereignty. The Court overruled its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which held that the Commerce Clause does not empower Congress to enforce the FLSA against the States in areas of traditional governmental functions. The dissenting Justices in Garcia believed the majority misconstrued the concept of federalism, resulting in continued uncertainty as to the correct approach in determining whether Congressional action under the Commerce Clause impermissibly infringes on fundamental aspects of state sovereignty. However, the dissenting Justices believed "that this Court will in time again assume its constitutional responsibility." Garcia, 469 U.S. at 589. This case grants the Court an opportunity to clarify the boundaries of Congressional power under the auspices of the Commerce Clause.

Since the 1985 decision, this Court has issued several opinions conflicting with the principles enunciated in Garcia, yet never explicitly overruled the decision. Most recently, in Printz v. United States, 117 S.Ct. 2365 (1997), the court concluded that the Federal government may not compel the States to enact or administer a federal regulatory program. Id., at 2383. *See also* New York v. United States, 505 U.S.144, 188 (1992). The 1974 Amendments to the FLSA compel the States to administer the federal regulatory program regarding minimum wage and overtime requirements to State and local employees, and in

accordance with the holdings of Printz and New York, are unconstitutional.

A second dilemma exists in determining whether the FLSA is a federal law of general applicability, an issue important to ascertaining whether a balancing analysis is appropriate.

The 1974 Amendments to the FLSA applied specific provisions to state and local governments only, therefore, while the FLSA may be a law of general applicability, § 207(k), which is directed solely to state and local governments, is not. The whole object of the 1974 Amendments was to direct the functioning of the state executive, compromising the structural framework of dual sovereignty. Printz at 2383. In such a case, the law violates the basic principle of state sovereignty, which is a fundamental defect which cannot be overcome, and a balancing analysis is improper. Id. As such, the law must be declared unconstitutional as violative of state sovereignty.

Alternatively, even if the 1974 Amendments to the FLSA are recognized as laws of general applicability, Justice Powell, in his dissent in Garcia, establishes the proper analysis. Returning to the National League of Cities balancing test, Justice Powell weighs the federal interest in remedying substandard working conditions against the state interest in maintaining state sovereignty, and finds the state interest compelling.

> The financial impact on states and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as

> well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.

469 U.S. 578 (Powell, J., dissenting).

The 1974 Amendments, as applied to state and local governments, excessively interfere with the organization of governmental fire departments and hence affects how a government performs critical public safety functions. The local government is best suited to control public safety operations, firefighting, police forces, and emergency medical services. The question of the application of the FLSA to ambulance and rescue service personnel raises issues of federalism, and again broaches the propriety of the Garcia decision. "While the language of Garcia seemed definitive, the closeness of the vote, and the strength of the views expressed in the dissents suggested that the majority's judicial withdrawal from the field of Tenth Amendment federalism would not be the last word". James F. Blumstein, *Federalism & Civil Rights: Complementary and Competing Paradigms,* 47 Vand.L.Rev. 1251, 1287 (1994). This case presents an opportunity for the Court to readdress Tenth Amendment federalism in this context.

CONCLUSION

For the foregoing reasons, along with those set forth in the Petition filed by Anne Arundel County, Baltimore County requests that this court issue a writ of certiorari to consider this case.

Respectfully submitted,

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